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Supreme Court of the United States

OCTOBER TERM, 1948

No. 500

**THE UNION NATIONAL BANK OF WICHITA,
KANSAS, APPELLANT,**

vs.

CARL C. LAMB

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JANUARY 5, 1949.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

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No. 40684

**THE UNION NATIONAL BANK OF WICHITA, KANSAS, a National
Banking Corporation, Appellant,**

vs.

CARL C. LAMB, Respondent

**Appeal from the Circuit Court of Jackson County,
Missouri, at Kansas City**

Honorable James W. Broaddus, Judge

Agreed Transcript of the Record

This action was commenced on the 13th day of December, 1945, by Appellant filing its Petition on Judgment in the office of the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City. A copy of said petition upon which this case was tried, omitting caption and signatures is in words and figures, as follows, to-wit:

IN CIRCUIT COURT OF JACKSON COUNTY

"PETITION ON JUDGMENT

1. Plaintiff is and at all times mentioned herein was a national banking corporation duly chartered and existing under the laws of the United States, having its principal office and place of business in Wichita, Kansas.

[fol. 2] 2. Defendant formerly resided in Denver, Colorado, and now resides in Jackson County, Missouri.

3. The District Court for the Second Judicial District of the State of Colorado embracing the city and county of Denver, Colorado is and at all times herein mentioned was a Court of Record having common law jurisdiction, a seal and a clerk. Said court is and was vested with original general jurisdiction of all cases at law or in equity under the Code of Civil Procedure Volume 1, 1935 Colorado Statutes annotated and prior enactments carried into said 1935 Statutes. The acts, proceedings, judgments and rec-

ords of said court duly certified under the Act of Congress (28 U.S.C.A. Sec. 687; R.S. Mo. 1939, P3985) are entitled to full faith and credit under Section 1, Article IV, of the Constitution of the United States.

4. Attached and made part hereof is a duly certified copy in the form prescribed by said Act of Congress and Section 1864 R.S. Mo. 1939 of a judgment duly rendered in the exercise of its jurisdiction of said District Court mentioned in paragraph 3 herein in a certain cause No. 99,530 wherein the plaintiff herein duly recovered judgment against defendant on December 8, 1927, for \$3493.01 and costs, and of an order and judgment of said court in the exercise of its jurisdiction duly made and entered in said cause on October 27, 1945, which adjudged that no part of said judgment or costs was ever paid or satisfied and [fol. 3] ordered, adjudged and decreed that said Judgment of December 8, 1927 for \$3493.01 and costs in favor of plaintiff and against defendant be and the same was revived.

5. Said judgment of revival of October 27, 1945, was and is duly authorized by and conforms with the provisions of Chapter 93, Section 2, 1935 Colorado Statutes annotated. Plaintiff is entitled to enforce payment of said judgment under the laws of Colorado and to have execution therefor in the sum of \$3493.01 with simple interest thereon from December 8, 1927, at 8% per annum to March 7, 1935, and at the rate of 6% per annum on the original sum from and after March 7, 1935, until paid, under the provisions of Chapter 88, Section 2, of 1935 Colorado Statutes annotated, as amended effective March 7, 1935, plus the assessed costs of \$9.00.

6. Said judgment has the force and effect of and plaintiff is entitled to recover the amount thereof in this state and to have the same faith and credit given thereto as same is and would be given in Colorado as provided by Section 1864 R.S. Mo. 1939.

7. No part of said judgment or costs has been paid but the full sums here-before mentioned are lawfully due to and owing to plaintiff as the holder and owner of said judgment.

Wherefore, plaintiff prays judgment against defendant for \$3493.01, with simple interest at 8% per annum thereon [fol. 4] from December 8, 1927, to March 7, 1935, and at the rate of 6% per annum thereafter until paid, plus \$9.00 for costs assessed in said District Court, together with its costs herein.

[fol. 5]

EXHIBIT TO PETITION

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF
DENVER AND STATE OF COLORADO

STATE OF COLORADO,

City and County of Denver, ss:

Pleas in the District Court in and for the City and County of Denver, State of Colorado, in the Fifth Division thereof, before the Hon. W. A. Black, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the City and County Building in Denver, in said county, on the second Tuesday (it being the Eleventh day) of September, A. D. One Thousand Nine Hundred Forty-five.

Present: Honorable W. A. Black, one of the Judges of the District Court; James T. Burke, Esq., District Attorney of said District; Robert J. Kirschwing, Esq., Manager of Safety and Excise and Ex-Officio Sheriff of said County; John H. Winchell, Esq., Clerk of said Court.

[fol. 6] Be it remembered, That heretofore, and on to-wit, the 8th day of December A. D. 1927, the same being one of the regular juridical days of the September A. D. 1927 Term of Court, the following proceedings, inter alia, were had and entered of record in the Judgment Book, to-wit:

99530

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a Corporation,

vs.

CARL C. LAMB

Money Demand

The Court having this day ordered that judgment be entered herein in accordance with the prayer of the complaint, upon default; now therefore;

4

It is considered by the Court that the plaintiff do have and recover of and from the said defendant Carl C. Lamb the sum of thirty-four hundred ninety-three dollars and one cent (\$3493.01), together with its costs in this behalf laid out and expended, to be taxed, and have execution therefor. [fol. 7] And afterwards, and on to-wit, the 27th day of October A. D. 1945, the same being one of the regular juridical days of the September A. D. 1945 Term of said Court, the following further proceedings, inter alia, were had and entered of record in said Court, to-wit:

99530

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a
Corporation,

vs.

CARL C. LAMB

ORDER OF COURT

It appearing from the files and records of this Court in the above entitled matter that notice of the motion to revive judgment and the motion to revive judgment were duly served upon the defendant herein in accordance with law and with Rule 4 of the Rules of Civil Procedure and that the said notice of the motion to revive judgment and the motion to revive judgment were duly served on defendant by personal service on the 15th day of October, 1945; that more than ten (10) days has expired since the defendant was served as aforesaid; and that the defendant has not otherwise entered his appearance or made answer or other response to said notice;

And it further appearing, and the Court so finds, that [fol. 8] said judgment, the principal amount due thereon, and all costs and interest thereon, are wholly unpaid and unsatisfied and that no part thereof has ever been paid or satisfied;

Now, Therefore, Be It and It Is Hereby Ordered, Adjudged and Decreed, that the judgment entered against the defendant in the above entitled cause on the 8th day of December, 1927, be, and the same is hereby revived.

[fols. 9-11] Certificates to foregoing exhibit omitted in printing.

[fol. 12] Thereafter, and within due time, the defendant filed his answer, which said answer, omitting caption and signature is in words and figures, as follows:

IN CIRCUIT COURT OF JACKSON COUNTY

"ANSWER"

1. Defendant admits the allegations contained in Paragraph 1 of plaintiff's petition.

2. Defendant admits the allegations contained in Paragraph 2 of plaintiff's petition.

3. Defendant admits that a judgment was rendered in favor of plaintiff and against defendant by the District Court for the Second Judicial District of the State of Colorado on December 8, 1927, in the sum of Three Thousand Four Hundred Ninety-three Dollars and One Cent (\$3,493.01) and costs.

4. Defendant admits that on the 1st day of December, 1945, an order of revivor of said judgment described in Paragraph 3 hereof was entered by the District Court for the Second Judicial District of the State of Colorado, but denies that the motion to revive said judgment was served on defendant by personal service on October 15, 1945, as recited in said order of revivor.

5. Defendant, for further answer, alleges that the judgment rendered in favor of plaintiff and against defendant by the District Court for the Second Judicial Circuit of the State of Colorado on December 8, 1927, in the sum of Three [fol. 13] Thousand Four Hundred Ninety-three Dollars and One Cent (\$3,493.01) and costs has been fully paid and satisfied and was so paid and satisfied on December 9, 1937 and defendant states that there is not now and was not at the time of the attempted revivor of said judgment on December 1, 1945, anything due and owing on said judgment.

6. Defendant, for further answer, alleges that the judgment rendered in favor of plaintiff and against defendant by the District Court for the Second Judicial Circuit of the State of Colorado on December 8, 1927, in the sum of Three Thousand Four Hundred Ninety-three Dollars and One Cent (\$3,493.01) and costs, is barred by the Statutes

of Limitations in force and effect in the State of Missouri, R. S. 1939, Section 1038.

7. Defendant, for further answer, denies each and every allegation in plaintiff's petition, except those matters which have been expressly admitted in this answer.

Wherefore, having fully answered, defendant prays that he be discharged with his costs herein expended."

[fol. 14] Thereafter, and on April 3, 1947, the plaintiff, filed its interrogatories to defendant under Section 85, General Code of Civil Procedure, which said interrogatories to defendant, omitting caption, and signatures is in the following words and figures:

IN CIRCUIT COURT OF JACKSON COUNTY

INTERROGATORIES TO DEFENDANT UNDER SECTION 85, GENERAL CODE OF CIVIL PROCEDURE

The plaintiff submits the following interrogatories under Section 85, General Code of Civil Procedure (Laws of 1943, p. 379) to be answered by the defendant Carl C. Lamb, fully and in writing, under oath, and duly signed by said defendant, within fifteen days after the date of service hereof, as follows, to-wit:

1. On or about October 15th, 1945, was a notice personally delivered to you in substantially the following form, to-wit:

In the District Court in and for the City and County of Denver, State of Colorado

Civil Action No. 99530

Div. 5

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a Corporation, Plaintiff,

vs.

CARL C. LAMB, Defendant

NOTICE.

To Carl C. Lamb, defendant in the above named cause, You Will Please Take Notice that the Union National Bank

[fol. 15] of Wichita, Kansas, a corporation, the plaintiff in the above titled cause, has filed its Motion to Revive Judgment on the 13th day of October, 1945. A copy of said Motion to Revive Judgment is attached hereto. Said Motion requests that certain judgment entered in the above entitled cause on December 8, 1927, be revived in accordance with Rule 54 (h) of the Rules of Civil Procedure.

You Are Hereby Required to appear and show cause within ten (10) days after service of this notice upon you why said judgment should not be revived, and this you shall nowise omit to do.

John H. Winchell, Clerk of the District Court, by
John T. Doyle, Deputy Clerk.

Dated October 13, 1945.

2. On or about October 15th, 1945, was a copy of 'Motion to Revive Judgment' personally delivered to you in substantially the following form, to-wit:

In the District Court in and for the City and County of
Denver, State of Colorado:

Civil Action No. 99530

Div. 5

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a
Corporation, Plaintiff,

vs.

CARL C. LAMB, Defendant

MOTION TO REVIVE JUDGMENT

[fol. 16] Comes now the plaintiff, above named, by its attorneys Lon W. Marshall and Schaetzel & Knight, and shows to the Court that on December 8, 1927, a judgment was duly and regularly entered in and by this Court in the above entitled cause in favor of the plaintiff above named and against the defendant above named in the sum of \$3493.01 plus costs in the sum of \$9.00, and that said judgment remains wholly unpaid and unsatisfied, and that the amount now due and unsatisfied thereof is \$3493.01, plus

\$9.00 costs and plus interest at the legal rate since December 8, 1927.

Wherefore, plaintiff moves that said judgment be revived and that pursuant to Rule 54 of the Rules of Civil Procedure, the Clerk issue a notice requiring the defendant to show cause why said judgment should not be revived.

The Union National Bank of Wichita, Kansas, a Corporation, Plaintiff, by Don W. Marshall and Schaetzle and Knight, 322 Colorado Nat'l Bank Bldg., Denver, Colorado, MA 5344, Attorneys for Plaintiff.

Wichita, Kansas.

3. What payments, if any, have you made to apply on the judgment of December 8th, 1927, which is described and mentioned in the petition?

4. State the dates, amounts, and to whom each and all of such payments, if any, were made?

5. Have you ever paid money or valuables on the judgment [fol. 17] of December 8th, 1927, to any person other than plaintiff?

6. If your answer to Interrogatory No. 5 is 'Yes,' state the times, amounts, and to whom all of such payments were made.

Thereafter, and on April 8, 1946, the defendant filed his answers to interrogatories, which said answer to interrogatories, omitting caption, is in the following words and figures:

IN CIRCUIT COURT OF JACKSON COUNTY

"DEFENDANT'S ANSWERS TO INTERROGATORIES

1. Yes.
2. Yes.
3. No money payments have been made.
4. (See answer to Interrogatory 3.)
5. No.

(Signed) Carl C. Lamb, Defendant.

Subscribed and sworn to before me this 8th day of April 1946. Theodore F. Houx, Jr., Notary Public. (Seal.) My commission expires Jan. 10, 1948.

[fol. 18] IN CIRCUIT COURT OF JACKSON COUNTY

Transcript of Proceedings

Be It Remembered, that on Monday, the 21st day of April, 1947, the same being the 37th day of the regular March, 1947, term of said court, the above entitled and numbered cause coming on regularly for trial before the Honorable James W. Broadbush, Judge of said Court, the following proceedings were had and entered of record, to-wit:

APPEARANCES

For the Plaintiff: Mr. Maurice J. O'Sullivan and John J. Killiger, Jr.

For the Defendant: Mr. Cornelius Roach.

[fol. 19]

OFFER IN EVIDENCE

The plaintiff to sustain its case offered and introduced in evidence, the authenticated proceedings in the Colorado District Court, which were attached to and made part of the original petition filed, together with the Interrogatories to defendant and defendant's answers thereto as heretofore shown herein, over the following objections and exceptions of the defendant, to-wit:

[fol. 20] OBJECTIONS AND EXCEPTIONS OF DEFENDANT

There are two propositions we submit to your Honor. The first is this. By its very terms this suit is outlawed. Here is a judgment in Colorado entered in 1927, no attempt is made of revival until 1945, that is some eighteen years later. No attempt of revival of any kind. Now, the statute here clearly provides that any judgment of this or any other state shall be conclusively presumed to be paid in ten years except and unless it has been revived during that ten year period. The other exception, there has been no payment entered of record within that original ten year term. The record must be preserved under the terms of this statute, if the Court please, it is handled on the basis as a rule of evidence. I am making my proper record of objection [fol. 21] to the introduction of the evidence of plaintiff.

Mr. Killiger: I intend to submit on the pleadings and interrogatories.

Mr. Roach: If he is not going to offer his judgment in evidence—

Mr. Killiger: You have admitted it in your pleadings.

Mr. Roach: I haven't admitted it.

Mr. Killiger: If you want to put it on that basis I can offer the original judgment.

Mr. Roach: I think it is necessary in this case. The statute provides that any revival not only must be in the first ten year period but must be on personal service. I want to say this: There is no question here, as I understand, Mr. Killiger, that the service on the revival proceedings were not by personal service?

Mr. Killiger: The service was by the Sheriff of Jackson County.

Mr. Roach: And by mail to Jackson County?

Mr. Killiger: I don't recall, that probably is so.

Mr. Roach: Mr. Lamb was not served with process in Colorado?

Mr. Killiger: That is right.

Mr. Roach: In the revival proceedings?

Mr. Killiger: That is right.

Mr. Roach: Therefore the statute to revive a judgment [fol. 22] which will support a subsequent action is based upon personal service and there is no personal service here.

Now, Mr. Killiger will raise the question of the full faith and credit clause. I want to say to you the Missouri Statute, Section 1038, does not contain that clause. It has been held and held a number of times that the full faith and credit clause only extends to—every state has the right to enact a statute of limitations. Of course in this instance the same rule applies to a Missouri judgment as to a foreign judgment. It is perfectly clear in this matter that if this had been a Missouri judgment, not a Colorado judgment, that it would be outlawed by the terms of this statute and no one can conceive that the Legislature of this state thought of giving a foreign credit or greater rights in the State of Missouri than their own creditors. I think the Court on examining the authorities will be thoroughly satisfied. This being a rule of evidence I think it is unnecessary for the plaintiff to proceed to offer evidence at this time. After the opening statement of counsel for the plaintiff and my opening statement I move to dismiss the

proceedings on the ground that the pleadings and the judgment, a copy of which is attached to the petition, has been outlawed by the provisions of Section 1038 of the Revised Statutes of Missouri 1939 and that no proceeding may be founded upon that judgment.

[fol. 23] The Court: That goes to the entire case, Mr. Roach, I would rather determine that later, if you please, sir.

Mr. Killiger: Do you want me to offer this judgment in evidence at this time?

Mr. Roach: I think it is necessary.

OFFER IN EVIDENCE

Mr. Killiger: I offer in evidence the judgment of the District Court, State of Colorado, rendered in September, 1945, a copy of which was duly authenticated by the Act of Congress and is attached to the petition in this case (Plaintiff's Exhibit 1 was Marked for Identification).

OBJECTIONS OF DEFENDANT

Mr. Roach: The defendant objects to the offer of Plaintiff's Exhibit No. 1 for the reason that such judgment shows on its face that it was rendered in 1927 in the State of Colorado and was not revived upon personal service within ten years from the date of the original rendition of the judgment for which reason it is inadmissible in evidence under the provision of Section 1038, Revised Statutes of Missouri 1939, and for the further reason such judgment shows upon its face it was not at any time revived upon personal service but was revived in the year 1945 in the State of Colorado upon substituted personal service by service of notice of revival upon the defendant Lamb by registered mail delivered to him in Kansas City, Missouri, and by service of a notice and copy of the motion upon Mr. Lamb in Kansas City, Missouri, by the Deputy Sheriff of Jackson [fol. 24] County, Missouri, and that under the provision of Section 1038 this suit may not be maintained and the evidence of such judgment is inadmissible herein.

Mr. Killiger: May I get one more admission? You will admit that the statute of limitations on this judgment in Colorado was a twenty year statute in accordance with the laws of the State of Colorado, it was properly revived

in that state and is a perfectly good judgment at this time in the State of Colorado?

Mr. Roach: I can't concede that. I do not know the effect of this revival in the State of Colorado. I am inclined to believe in the State of Colorado this judgment would not support an execution, might constitute a lien on real estate in that state because of being bottomed upon substituted personal service but I will have no objection to counsel offering or giving to the Court such laws of Colorado as relates to this matter.

STIPULATION AS TO SERVICE ON REVIVAL PROCEEDINGS

It is definitely stipulated here, is it, Mr. Killiger, the only service on the revival proceedings on the judgment in Colorado, were in 1945, and were by service of notice and a copy of the motion to revive delivered to Mr. Lamb in Kansas City, Missouri, one by registered mail and the other by service by a Deputy Sheriff of Jackson County, Missouri?

Mr. Killiger: I will admit that.

[fol. 25] The Court: Very well. The Court will take the objection with the case inasmuch as it goes to the entire case. At this time the objection is overruled.

Mr. Killiger: I think that is all.

(Which said Plaintiff's Exhibit 1, previously marked for identification, and so offered in evidence, is in the following words and figures:)

(Plaintiff's Exhibit 1 is set forth on Side Pages 6 to 13, inclusive.)

[fol. 26] The Court: I will take this case under advisement, gentlemen.

FINDING AND JUDGMENT

(And thereafter, and on Friday, June 27, 1947, the same being the 40th day of the May, 1947, term of said Court, this cause having been heretofore heard by the Court and taken under advisement, and the Court now being fully advised in the premises, finds the issues in favor of the defendant.)

(Whereupon, judgment was entered as follows:)

Wherefore it is ordered by the Court, that plaintiff take nothing by this action and that defendant have and recover of and from plaintiff his costs herein incurred and expended and have therefor execution.

(And thereafter, and on Wednesday, July 2, 1947, the same being the 44th day of the May, 1947, term of said court, and within ten days after the rendition of said judgment, the plaintiff filed in said court and cause its Motion for New Trial, which was duly endorsed with the name of the court, the number and style of the cause, the title of the paper, and the name of plaintiff's counsel, and further endorsed by the Clerk of said court as follows:)

Filed, Jul. 2, 1947. Thomas J. Gill, Clerk. By J. R. Duff, Deputy.

(Said Plaintiff's Motion for New Trial, omitting caption and signatures, is in the following words and figures [fol. 27] uses:)

IN CIRCUIT COURT OF JACKSON COUNTY

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff prays the Court to set aside the judgment in favor of defendant and against plaintiff entered herein on June 27th, 1947, and to grant plaintiff a new trial of this action or alternatively to set said judgment aside and to enter judgment herein on the pleadings and evidence submitted in favor of plaintiff and against defendant according to the prayer of plaintiff's petition and as reasons therefor, plaintiff states:

1. The judgment of the Court is against the law and the evidence and the Court erred in failing to enter judgment for plaintiff as prayed, under the uncontroverted facts and the governing law.

2. Because the judgment denied plaintiff and the Colorado judgment under which it claims the right to relief, the security guaranteed by Section 1, Article 4, of the Constitution of the United States, and the judgment is contrary to and in violation thereof.

3. Because the judgment denied full faith and credit to the valid judgment pleaded, proved and relied upon by plaintiff for recovery, and denied plaintiff the security, rights and privileges secured to it under Article 4, Sections 1 and 2 of the Constitution of the United States:

4. Because the judgment is contrary to the law declared [fol. 28] in cases controlling upon the Court under the undisputed evidence among which are:

(a) *Union Fire Ins. Co. vs. Hanson* (May 19, 1944), 180 SW 2d, 265, where a Nebraska judgment rendered December 7, 1932, was revived under the laws of Nebraska more than ten years thereafter, to-wit: on March 9, 1943. Under Nebraska law the judgment would be dormant in five years unless certain things were done. Under the Nebraska laws the judgment was duly revived on March 9, 1943, and was then a good judgment under Nebraska law. In a suit filed thereon in Missouri, the Court held that full faith and credit must be given to the action of the Nebraska District Court, and that the trial court could do nothing else than enforce it in Missouri.

(b) *Kratz vs. Preston*, 52 Mo. App. 251, 256, where a Pennsylvania judgment rendered July 26th, 1861, was revived in that State on February 11, 1891 (more than twenty years thereafter which was more than the Missouri limitation period), upon *scire facias* served on defendant in Missouri, after he removed from Pennsylvania, *HELD*, the *scire facias* was a continuance of the original action in which defendant was personally summoned in Pennsylvania, and that judgment for plaintiff was required in Missouri, under the full faith and credit constitutional clause.

(c) *O'Connell vs. Smith*, 131 SW 2d, 730, (sub. 1 and 2) and *Cook's Estate vs. Brown*, 140 SW 2d, 42, (sub. 1), [fol. 29] (Mo. Sup.) and cases cited therein holding that judgments valid under Illinois laws were entitled to full faith and credit in Missouri, although rendered on *cognovit* notes which the Missouri courts have consistently condemned and held void.

(d) *Sutton vs. Cole*, 155 Mo. 206; 55 SW 1052 *Peak vs. Peak*, 181 SW 394 (Sup. Div. 1) *In Re Jackman's Estate*, 124 SW 2d, 1189 (Sup. Div.) *Collins County*

Bank vs Hughes, 155 Fed. 389 (Colo.) 8th Circuit
White vs Q. R. Evans, 157 Fed 2d 857 (C.A. DC)
M. & A. Lumber vs Greenwood Dist., 249 U. S. 170,
 63 L. Ed. 538 *Milwaukee County vs White Co.*, 296
 U. S. 268, 80 L. Ed. 226, 225 Sub. 7, 227, Sub. 11

5. Because the judgment of the Court erred and contravenes the controlling law declared in *Magnolia Petroleum Co. vs. Hunt*, 320 U. S. 430, 4381, 88 L. Ed. 149, 1c. 154, as follows:

'The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another. Article 4, Section 1, of the Constitution commands that 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State,' and pro-[fol. 30] vides that Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.' And Congress has provided that judgments shall (438) have such 'faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Act of May 26, 1790, c 11, 1 Stat 133, as amended, 28 USCA Section 687, 8 FCA title 28, Section 687.' 'From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other.'

Citing Cases

'Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, the Court is the final arbiter of the extent of the exceptions.'

Citing Cases

[fol. 31] 'And we pointed out in *Williams v. North Carolina supra* (317 U. S. 294, 295, 87 L. Ed. 283,

284, 63 S. Ct. 207, 143 ALR 1273), that 'the actual exceptions have been few and far between' . . .

'We are aware of no such exception in the case of a money judgment rendered in a civil suit. Nor are we aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition. *Milwaukee County v. M. E. White Co.*, supra (296 U. S. 277, 278, 80 L. Ed. 228, 229, 59 S. Ct. 229).'

'It compels enforcement of a judgment in that forum, even though a suit upon the original cause of action was barred there by limitations, before the judgment was procured, *Christmas v. Russell*, 5 Wall. (US) 290, 18 L. Ed. 475, supra; *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed. 365, 48 S. Ct. 142, 53 ALR 1141.'

'It demands recognition of it even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state.'

'The full faith and credit clause thus became a [fol. 32] nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others by making each an integral part of a single nation, in which rights judicially established in any part are given nationwide application.'

Wherefore, plaintiffs prays the judgment of the Court.

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

(And thereafter, and on September 29, 1947, the same being the 19th day of the September, 1947, term of said court, the said Plaintiff's Motion for New Trial was taken up, heard and overruled by the Court; to which said action

and ruling of the Court, the plaintiff at the time duly excepted and still excepts.)

(And thereafter, and on Monday, October 6, 1947, the same being the 25th day of the September, 1947, term of said court, the plaintiff filed and presented to the Court in said cause its Notice of Appeal, which was duly endorsed with [fol. 33] the name of the court, the number and style of the cause, the title of the paper, and the name of the plaintiff's counsel, and further endorsed by the Clerk of said court as follows:)

"Filed October 6, 1947, Thomas J. Gill, Clerk, Irma L. Helm, Deputy."

(Said Notice of Appeal, omitting caption, is in the following words and figures:)

IN CIRCUIT COURT OF JACKSON COUNTY

"NOTICE OF APPEAL."

Notice is hereby given that Union National Bank of Wichita, plaintiff, above-named, hereby appeals to the Supreme Court of the State of Missouri from the judgment in favor of the defendant and against the plaintiff, entered in this action on the twenty-seventh day of June, 1947, in Division 6 of the Circuit Court of Jackson County, Missouri at Kansas City.

Maurice J. O'Sullivan, Attorney for Plaintiff, address 700 Columbia Bank Bldg.

Dated October 6, 1947.

Plaintiff's motion for new trial was over-ruled September 29, 1947 and this Notice of Appeal is filed and docket fee paid within ten days thereof."

[fol. 34] IN CIRCUIT COURT OF JACKSON COUNTY

ORDER ALLOWING APPEAL

(And afterwards, and on the 6th day of October, 1947, the same being the 25th day of the September, 1947, term of said court, said plaintiff's Notice of Appeal having been duly seen and heard by the Court was by the Court allowed and an appeal granted to said plaintiff to the

Supreme Court of the State of Missouri; and the Court also gave said plaintiff at said time leave to file its Bill of Exceptions within the time required by law.)

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER EXTENDING TIME

(And thereafter, and on Thursday, December 11, 1947, the same being the 26th day of the November, 1947, term of said court, and within the time heretofore allowed by the Court, for good cause shown, the time for filing the Transcript on Appeal in this cause was by the Court extended to on or before the 20th day of March, 1948.)

[fol. 35] ORDER SETTLING TRANSCRIPT ON APPEAL

Now, therefore, the Court being duly advised in the premises, doth find the foregoing to be a correct Transcript on Appeal taken and saved on behalf of the plaintiff herein, and doth now sign the same and doth order that the same may be filed, sealed, and made a part of the record in this cause.

Given under the hand of the judge of said court before whom said proceedings were had on this 5th day of January, 1948.

James W. Broaddus, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri

IN SUPREME COURT OF MISSOURI

Said transcript was filed in the Supreme Court of Missouri within the time required by law.

ARGUMENT AND SUBMISSION

This cause was duly assigned to Division Number One of the Supreme Court of Missouri and was set for oral argument therein and was duly argued by counsel for the re-

spective parties on May 6, 1948, and was taken under advisement by the Court.

[fol. 35a]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE,
APRIL SESSION, 1948

No. 40684

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a Corporation, Appellant,

VS.

CARL C. LAMB, Respondent

OPINION—Filed July 12, 1948

Action to recover on a Colorado revived judgment. A trial without a jury resulted in a finding and judgment for defendant and plaintiff appealed. The appeal lies to the supreme court because the amount in dispute exceeds the sum of \$7500. See Art. V, Sec. 3, Constitution.

December 8, 1927, plaintiff obtained a judgment for \$3,493.01 against defendant in the district court of Denver, Colorado. No payment was made on this judgment. October 27, 1945, nearly 18 years after original rendition, the Colorado Judgment was revived by getting extraterritorial personal service upon defendant in Jackson County, Missouri. December 13, 1945, plaintiff filed the present cause to recover on the revived judgment.

Defendant makes two defenses, first, that plaintiff's cause is barred by Sec. 1038 R. S. 1939, Mo. RSA, Sec. 1038, and second, that the judgment of revival in Colorado was not upon personal service as required by Sec. 1038. This section provides: "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied *after the expiration of ten years from the date of the original rendition thereof*; or if the same has been revived upon *personal service* duly had upon the defendant or defendants therein, then *after ten years from and after such revival*, or in case a payment has been made on such judg-

[fol. 35b] ment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of *the original rendition or revival upon personal service*, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever" (italics ours).

The Colorado statute of limitation on a judgment is 20 years, and the lien expires in 6 years. 3 Colo. Ann. Stat. 1935, Ch. 93, Sec. 2. This section, among other things, provides that "from and after twenty years from the entry of final judgment in any court of this state, the same shall be considered as satisfied in full, *unless revived as provided by law.*" If the present judgment had not been revived it would have been barred in this state in 10 years from the date of its original rendition, notwithstanding the 20 years limitation of the Colorado statute. See, 1038, *supra*; Northwestern Brewers Supply Co. v. Vorhees (Mo. Sup.), 203 S. W. (2d) 422, and cases therein cited. *The question is, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of its original rendition the limitation fixed for revival by Sec. 1271 R. S. 1939, Mo. RSA Sec. 1271.* This section is as follows: "The plaintiff or his legal representative may, at any time within ten years, sue out a scire facias to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue."

Plaintiff contends that to bar the present revived judgment would be contrary to the full faith and credit provision of the federal Constitution, Art. IV, Sec. 1, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." But "it has uniformly been held that each of the states of the Union may *pass a law limiting the time within which an* [fol. 35c] *action may be brought on a judgment rendered in another state* without thereby depriving the judgment of the full faith and credit to which it is entitled under the

Constitution of the United States." 11 Am. Jur. Sec. 192, p. 507; 34 C. J., Sec. 1578, p. 1110; Northwestern Brewers Supply Co. v. Vorhees, *supra*. It is the general rule that the *lex fori* governs the limitation of actions within its borders, and that the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the *lex loci*. "In short the *lex fori* determines the time within which a cause of action shall be enforced." 11 Am. Jur. Secs. 191, 192, pp. 505, 507; Northwestern Brewers Supply Co. v. Vorhees, *supra*.

Now to the question, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of rendition of the original judgment? We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Sec. 1038.

Plaintiff cites many cases from this and other jurisdictions, both federal and state. Among these are *Crim. v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 LRA 502; *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 488, 168 ALR 656; *Milwaukee County v. White Company*, 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. 220; *Adams v. Saenger et al.*, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649. It is not necessary to refer to all these cases; none is pertinent to the question of limitation in hand except *Union Fire Ins. Co. v. Hansen*, 237 Mo. App. 1110, 180 S. W. (2d) 265, by the Springfield Court of Appeals, and *Kratz v. Preston*, 52 Mo. App. 251, by the Kansas City Court of Appeals. The Hansen case was on a Nebraska judgment rendered December 7, 1932, and revived March 9, 1943, more than 10 years after original rendition. The trial court found for the plaintiff and the defendant appealed; the judgment was affirmed. The court said: "Article IV, section 1, of the United States Constitution, provides that 'full faith and credit shall be given in each state to the public acts, records and judicial [fol. 35d] proceedings of every other state.' On March 9, 1943, the Nebraska judgment against defendant was duly revived in Nebraska under the laws of Nebraska, as thus certified. It was then a good judgment in Nebraska. Full faith and credit must be given to the action of the district court of Nebraska. The trial court, therefore, could do nothing else than enforce the said Nebraska judgment in

Missouri." No case was cited; limitation was not considered, and Sec. 1038 was not mentioned.

The Kratz case was an action on a Pennsylvania judgment rendered July 26, 1861, and revived February 11, 1891, nearly 30 years after original rendition. What is now Sec. 1038 was Sec. 6796 R. S. 1889, when the Kratz case was decided, and the limitation on a judgment was then 20 years. There was no revival provision in the section at that time. It was held in the Kratz case that limitation began to run from the date of revival and not from the date of the original judgment. What is now Sec. 1038 was amended in 1895, Laws 1895, p. 221, and in 1899, Laws 1899, p. 300. The section in the statute of 1889, as stated, fixed the limitation of a judgment at "twenty years from the date of rendition." Since 1899, the section has not been changed, and as appears in Sec. 1038, the limitation is fixed at "ten years from the date of the *original* rendition" (italics ours). It was in the Act of 1899 that the term *original* was first inserted. Also, it was in the Act of 1899 that the revival provision was first inserted. In view of the language in Sec. 6796 R. S. 1889, "twenty years from date of rendition", and in view of the then absence of any provision as to limitation on a revived judgment, the Kratz case ruling can be understood because the suit on the revived judgment was filed shortly after its rendition. The date when filed does not appear, but the case was decided January 2, 1893, less than two years after the judgment was revived.

Under Sec. 1038 a domestic or foreign judgment is barred in 10 years from the date of its original rendition unless it is revived or payment made, and under Sec. 1271, a domestic judgment, if revived at all, must be revived within "ten years from the rendition of the judgment." It will be noted that Sec. 1271, the revival section, does not say [fol. 35c] "from the original rendition", hence a second, third, etc., revival may be had if within 10 years from the last one. Definitely; it is the law of this state that a foreign judgment, absent revival, or a payment thereon as provided in Sec. 1038, is barred in 10 years from the date of its original rendition regardless of what the limitation period may be under the law of the state where the judgment was rendered. Northwestern Brewers Supply Co. v. Vorhees, supra. And the only reasonable conclusion to

draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum.

Our ruling, *supra*, disposes of this appeal, hence it is not necessary to rule the second defense that the service upon defendant for revival of the Colorado judgment was not *personal service* within the meaning of that term in Sec. 1038.

The judgment should be affirmed and it is so ordered.

(Signed) John H. Bradley, Commissioner.

Per CURIAM: The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the Judges concur.

Dalton, C., concurs.

Van Osdel, C., concurs.

[fol. 36] Thereafter and within the time required by the Rules of said Court, appellant duly filed "Appellant's Motion to Rehear or to Transfer Cause to Court in Banc."

Said motion (caption and signatures omitted, duly filed as aforesaid) was in words and figures as follows:

[fol. 37] IN SUPREME COURT OF MISSOURI

APPELLANT'S MOTION TO REHEAR OR TO TRANSFER CAUSE TO COURT IN BANC

Appellant respectfully prays the Court to set aside the opinion and judgment rendered on July 12, 1948, and to grant a rehearing herein, or alternatively to transfer this cause to the Court *In Banc* for hearing and final determination, because:

I

The Opinion Erred by Denying Full Faith and Credit to the Duly Authenticated Final Money Judgment upon Which

This Suit Was Filed Only Forty-seven Days After the Colorado District Court Rendered Its Judgment of Revival and for Recovery Thereon. The Opinion and Section 1038 R. S., 1939 as Now Construed, Contravene and Are Repugnant to Article IV, Section 1, of the Constitution of the United States to 28 U. S. C. A., Section 687, and to Controlling Decisions of the Supreme Court of the United States, Which Is the Final Arbiter With the Duty to Define and Secure Constitutional Guarantees Against Denial. The Errors in Substantive Federal Law in Material Matters of General Application Is of Grave Concern and Public Importance.

(A)

The opinion inadvertently misconstrued Section 1038, R. S., 1939. It was error to apply it as a conclusive presumption of satisfaction of the original Colorado judgment and not as a statute of limitations. It thereby contravened U. S. Const. Art. IV, Sec. 1 and 28 U. S. C. A. 682, by denial of the contrary adjudication of the Colorado Court duly made under the lex fori. The judgment of October 27, 1945, reviving the original judgment as of that date and for recovery thereon was conclusive upon defendant and precluded a collateral attack, redetermination or denial of full faith and credit thereon.

The full faith and credit clause, rules of comity and res judicata foster public respect for courts, which is the foundation of the due administration of justice. Judgments refusing to enforce valid final judicial acts of other [fol. 38] courts of competent jurisdiction, whether foreign or domestic, which subject the debtor to recovery of money in another forum, are of public concern and invite similar public disrespect of the courts. Subject to limitation laws as a recognized exception, a valid judgment due elsewhere should be recoverable where the debtor may be found. The laws of each state are of equal dignity. The incidences of the laws of the state which the debtor voluntarily elected to accept by his entry before judgment cannot be affected therein by the laws of a sister state. The full faith and credit clause requires mutual recognition of the equal dignity of the laws of each state and of final adjudications thereunder. It prohibits substitution of local laws and policy where the debtor is found for the laws and policy of the state from which the judgment debtor came.

Local laws, policies, states rights or preference for its own laws are not in issue in a suit on a judgment of a sister state. Enforcement of the same rights and liabilities which governed the parties under the laws of the state in which the judgment was rendered is just and should have been granted by comity (15 C. J. S. 836). The duty was mandatory under the full faith and credit clause.

50 C.J.S. 480, 481, 482, Sec. 889 (d), (e) properly states:

(d) "There may be exceptional cases where the full faith and credit clause does not require that recognition be given a judgment of a sister state which is in violation of the laws and policy of the forum, and the Supreme Court of The United States is the final arbiter of such cases.

"There are no exceptions in the case of a money judgment rendered in a civil suit, the policy or law of the forum in which it is sought to enforce such a judgment cannot impair the force and effect which the full faith and credit clause of the federal Constitution and the act of congress require to be given to such a judgment outside the state of its rendition. . . . It compels enforcement of a judgment, even though a suit on the original cause of action, if brought in the forum before judgment was obtained, would have been barred by limitations. A judgment must be recognized, even though the statute on which the judgment is based need not be applied because it is in conflict with the law and policy of the forum."

(e) "In accordance with the general rule, considered supra subdivision b of this section, that a judgment is entitled to the same faith and credit as is accorded it in the state where rendered, a judgment is not subject to collateral attack in another state if not subject to such attack in the state where rendered."

[fol. 39] The opinion, (p. 2, 3), chiefly relied for support upon *Northwestern Brewers Supply Co. vs. Vorhees*, (Mo. Div. 1), 293 S. W. 422; 11 *Am. Juris.* 505, 507, *Secs.* 191, 192 and 34 C. J. Sec. 1578, p. 1110. The *Vorhees* case ruled that Section 1038 is both a statute of limitations and *one creating a presumption of satisfaction as at common law*. It quoted from *M'Elmoyle vs. Cohen*, 13 Pet 312, 10 L. Ed. 177, and *Bacon vs. Howard*, 20 How. 22, 61 U. S. 22, 15 L. Ed. 811.

The opinion herein (p. 2) states "In short the *lex fori* determines the time within which a cause of action shall be enforced." After that correct principle was declared, it was then wholly abandoned.

The *lex fori* governed the time within which the Colorado Court had jurisdiction to render the judgment of revival of October 27, 1945. The Missouri statute had no extra-territorial operation. It could not govern nor control the Colorado proceedings. Missouri courts were without constitutional right to apply its statute as a presumption of satisfaction to the original Colorado judgment. That was a matter exclusively within the jurisdiction of the Colorado Court. The ten year bar of limitation under the Missouri statute had no application to the valid money judgment of revival rendered by the Colorado Court forty seven days before suit was filed thereon in Missouri.

The *Vorhees* case, *M'Elmoyle vs. Cohen and Bacon vs. Howard*, cited therein, were misconstrued. The *Vorhees* case properly ruled that the Missouri ten year statute of limitations barred recovery upon the Wisconsin judgment, which was not revived. Although immaterial, the *Vorhees* case incorrectly ruled that Section 1038, R. S., 1939, created a conclusive presumption of satisfaction. It pointed out that the non-conclusive presumption of payment under the former statute was a mere rule of evidence subject to rebuttal. Amendment of 1895, provided that except in cases of revival or partial payment entered of record, the presumption of satisfaction was conclusive. The amended statute is still but a rule of evidence, although the presumption of satisfaction is made conclusive.

The Colorado judgment of revival and for recovery thereon judicially determined that the original judgment was not satisfied. It adjudged revival thereof with the same force and effect as if it has been originally rendered on October 27, 1945, and for recovery thereon. That judgment became final and defendant was bound thereby. The excerpts next quoted from controlling decisions upholding limitation statutes, demonstrate that they do not rule that [fol. 40] full faith and credit may be denied by applying a statute creating a presumption of payment to the cause of action underlying a final judgment. Cases cited under subdivision (C) affirmatively rule that statutes of similar import contravene Article IV, Section 1 and are void, controlling cases are cited in subdivision (B), which rule that a

judgment of revival is a final judgment within the meaning of the full-faith and credit clause.

The *Worcester Case*, 203 S. W. 2d L. c. 423, 2d, sup. 3, 6, quotes from *M'Elmoyle vs. Cohen*, in part as follows:

But the point might have been shortly dismissed with this sage declaration, *that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, Exclusive of All Interference With Their Merits.* It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments, is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred. (Emphasis ours)

It also quotes, L. c. 423, 424, the following from *Bacon vs. Howard*, 20 How. 22:

But the rules of prescription remain, as before, in the full power of every state. There is no clause in the constitution which restrains this right in each state to legislate upon the remedy in suits on judgments of other states, *Exclusive of All Interference With Their Merits.* (Emphasis ours).

Bank of Alabama vs. Dalton, 9 How. 522, 13 L. Ed. 242, 244-245, clarifies the true rule and declared:

The legislation of Congress amounts to this: that the judgment of another State shall be record evidence of the demand, *and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it.* This is the whole extent to which Congress has gone. As to what further "effect" Congress may give to judgments rendered in one state and sued on in another does not belong to this inquiry; we have to deal with the law as we find it, and not with the extent of

power Congress may have to legislate further in this respect. That the legislation of Congress, so far as it has gone, does not prevent a State from passing acts of limitation to bar suits on judgments rendered in another State, is the settled doctrine of this court. It was established, on mature consideration, in the case of *McElmoyle v. Cohen*, 13 Peters, 312; and to the reasons [fol. 41] given in support of this conclusion we refer."

Allegheny County vs. Maryland Casualty Co., 132 Fed 2d 894, 897, says, sub 5-8:

"But it must be remembered that a judgment is the sentence of the law given by the court as the result of proceedings instituted therein for the redress of an injury. If it is a final judgment it terminates the controversy and either merges into itself or bars the plaintiff's claim. *It thus itself becomes the generating source of new rights and liabilities of the parties. Under the constitution it is entitled to full faith and credit in every American jurisdiction.*" (Emphasis ours).

Deposit Bank vs. Board of Councilmen of Frankfort, 191 U. S. 499, 48 L. Ed. 276, 1 c. 280, 281, ruled:

"The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable

to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

B

The judgment of revival was a final judgment under the lex fori which was conclusive upon the parties. It was entitled to full faith and credit and precluded redetermination or the application of a presumption of payment in Missouri to the underlying cause of action to revive the original judgment.

Dickinson vs. Wilson, 3 How. (U. S.) 57, 11 L. Ed. 491, (cited 47 Am. Juris. 470, Sec. 11, N. 2), ruled:

"The judgment on the first scire facias, although ancillary to the original judgment, and the foundation of the proceeding on the second scire facias, was, nevertheless, a final judgment, and in that count conclusive upon the parties; and imposed an insuperable bar to any plea of either party, whether of law or of fact, designed to go beyond it." (Emphasis ours).

[fol. 42] This court held in *Schneider vs. Maney*, 242 Mo. 26, 145 S. W. 823, 824, that a judgment of revivor "is a recognition of the existence of the original judgment and a continuation of its life." *Mo. & Ark. L. & M. Co. vs. Greenwood*, 249 U. S. 120, 63 L. Ed. 538, ruled that a judgment of revival is a remedy for avoidance of the statute of limitations and to avoid a presumption of payment from lapse of time.

Brown vs. Charez, 181 U. S. 68, 45 L. Ed. 752, 754, ruled that scire facias to revive a judgment was in the nature of an action because the defendant may plead to it and that the averments of the writ are equivalent to a petition or declaration. Such proceedings were held to be within the meaning of "all actions founded upon any judgment" in a New Mexico statute which required such actions to be commenced within seven years. A judgment merged in a judgment of revivor is no more open for review than any other cause of action which is merged in a final judgment.

Continental Nat. Bank vs. J. H. Shelley, 115 A. L. R. 543, 77 Pac. 2d 355, (Utah) in a carefully considered opinion ruled, (115 A. L. R. 1 c. 546):

"The ~~first~~ of the section, so far as is material to the question under consideration, is found in the words, 'the court . . . must revive the original judgment.' To contend that this can mean other than *the original judgment is to be rendered operative and effective is to trifle with words and human understanding*. . . . The clear and unequivocal purport of the language of the last clause effects only the operative or effective date of the original judgment; *that is, changes it from the time of entry of the original judgment to the time of the entry of the order directing revival*." (Emphasis ours).

A similar rule is stated in 49 C. J. S. 1006, sec. 548 and at 1020, Section 549, as follows:

"The revival of a judgment by regular proceedings reinvests it with all the effect and conditions which originally belonged to it, and which have been wholly or partly suspended by lapse of time, change of parties, or other cause."

49 C. J. S. 1006, sec. 548, states:

"A scire facias to revive a judgment is a judicial, but not an original, writ. Although it is in the nature of an action because defendant may plead to it, and has been held to come within the meaning of "action" in some cases it has been classified in substance as a new action, it is more widely held that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuation of the former suit, or in [fol. 43] other words, it is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment."

(C)

Section 1038, R. S. 1938, Mo. R. S. A., Sec. 1038, as construed by the Court, is unconstitutional and void under the controlling decisions cited hereunder, which were inadvertently overlooked and not mentioned.

In *Rpche vs. McDonald*, 275 U. S. 449, 72 L. Ed. 365, 48 S. Ct. 142, Washington's statute was in issue which provided that a judgment should cease to be a charge and that no suit should be had to extend its duration or to continue it in force beyond six years. Roche sued in Oregon on a Washington judgment. Judgment against McDonald was rendered thereon more than six years after the date of the original Washington judgment. Shortly thereafter Roche sued to enforce the Oregon judgment in Washington. The Washington courts sustained McDonald's defense that the Washington statute prohibited recovery because the Oregon judgment was rendered more than six years after the date of the original judgment in Washington. The Washington courts concluded (as in effect does the opinion filed herein) that the judgment of a sister state should be viewed "*in the light of the foundation upon which it rests and the judgment law of our own state.*"

In reversing the Washington courts, Mr. Justice Sanford said:

"It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution required that the judgment of a state court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other state the same credit, validity and effect, which it has in the state where it was rendered, and be equally conclusive upon the merits; and that *only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state.*" (Citing cases) "This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, *must be enforced in such other state, although repugnant to its own statutes.*" (Citing cases; emphasis ours).

In *Christmas vs. Russell*, 5 Wall. 290, 302, 18 L. Ed. 475, 478, judgment on a Mississippi note was awarded by a Kentucky court after it was barred by the Mississippi statute of limitations. Suit was then filed on the Kentucky judgment in Mississippi. The Mississippi statutes also prohibited actions on judgments rendered by any court without

[fol. 44] the state against any resident of the state, *where the cause of action would have been barred by limitation if suit had been filed thereon in Mississippi*. It was ruled (72 U. S. 301, 302; 18 L. Ed. 1. c. 478:

"Instead of being a statute of limitations in any sense known to the law, the provision, in legal effect, is *but an attempt to give operation to the statute of limitations of that state, in all the other states of the union, by denying the efficacy of any judgment rendered in another state against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law.*"

"It was not competent for any other state to authorize its courts to open the merits and review the cause, or to enact that such a judgment should not receive the same faith and credit that by law it had in the courts of the state from which it was taken." (Emphasis ours).

In *Fawcett v. Lum*, 210 U. S. 231, 236, 52 L. Ed. 239, 1041, 28 S. Ct. 641, suit on a Missouri judgment was filed in Mississippi. The Missouri judgment was rendered on a contract made in Mississippi to gamble in cotton futures. A Mississippi statute made the contract a misdemeanor and provided that such contracts "*should not be enforced by any court.*" In reversing the Mississippi courts for refusing to accord full faith and credit to the Missouri judgment, the court said:

"The doctrine laid down by Chief Justice Marshall was that the judgment of a state court should have the same credit, validity and effect in every other court in the United States, which it had in the state where it was pronounced and that whatever pleas would be good to a suit thereon in such state and none others, could be pleaded in any other court of the United States."

In *Kenny v. Supreme Lodge L. O. M.*, 252 U. S. 411, 415; 64 L. Ed. 638, 40 S. Ct. 371, suit on an Alabama judgment was filed in Illinois. The Alabama judgment was on a ~~cause~~ of action which could not be brought or prosecuted under Illinois law. The Illinois statute was held to be unconstitutional and void because it was repugnant to the full faith and credit clause.

Pages 2 and 3 of the opinion state that the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the *lex loci*, and "In short the *lex fori* determines the time within which a cause of action may be enforced." The opinion fails to apply that rule but upon the contrary *refuses to accord full faith and credit to a final judgment of revival of the Colorado cause which was sued upon in Missouri forty seven days after its rendition* [fol. 45] *tion. The *lex fori* of Missouri was thereby substituted for the *lex fori* of Colorado to measure the merits and validity of the cause of action merged in the judgment.*

Section 1038 is unconstitutional and void as so construed. It did not bar the Colorado judgment as a statute of limitation.

Morris vs. Jones, 329 U. S. 545; *Milwaukee County vs. White*, 296 U. S. 268; *Titus vs. Wallick*, 306 U. S. 282; *Adam vs. Saenger*, 303 U. S. 59; *American Express Company vs. Mallins*, 212 U. S. 311; *Broderick vs. Rosner*, 294 U. S. 629, and other cases are cited or quoted on pages 15 to 19 and *Davis vs. Davis*, 305 U. S. 32, is quoted on page 10 of our original brief. The doctrines declared therein are relied upon without further comment. Under the authorities cited herein, the judgment of revival was conclusive as to all the *media concludendi* and was not subject to be impeached, whether right or wrong. The adjudication reviving the original judgment as of October 27, 1945, and for recovery thereon was not open to re-examination.

The error in denying full faith and credit to the valid judgment of a sister state as required under Article IV, Section 1, of the Constitution of the United States and 28 U. S. C. A., Sec. 687, deprived appellant of the constitutional guarantees secured thereby. The material errors in substantive federal law of general application are of grave public importance and impel further consideration by a rehearing or transfer of this cause. The rights of many litigants in this and other states may be jeopardized or lost by inability to appeal if the decision is followed pending review and if a reversal should be directed upon final hearing.

Law reviews have often commented upon the uniformity of the decisions of the federal Supreme Court from the beginning in construing Article IV, Section 1, to require full faith and credit (and nothing less) to be accorded to

judgments for recovery of money rendered by courts of sister states vested with jurisdiction under the *lex fori*. Decisions thereunder involving status as in divorce, custody and similar cases have varied from time to time. (Cf. *Haddock vs. Haddock*; 1st and 2nd *Williams vs. North Carolina* cases). The many cases reviewed under this section to maintain such uniformity and to suppress decisions [fol. 46] contributing further conflicts to the conflict of laws thereunder, are indicative of the public importance of an indisputably correct decision of the questions presented.

A rehearing or transfer of this cause is therefore respectfully prayed.

(Signed) Maurice J. O'Sullivan, John G. Killiger, Jr., 700 Columbia Bank Building, 921 Walnut Street, Kansas City, Missouri, Attorneys for Appellant.

Service acknowledged and copy received July 26, 1948.

(Signed) Cornelius Roach, Attorney for Respondent

[fol. 47] IN SUPREME COURT OF MISSOURI

ORDER OVERRULING MOTION TO REHEAR OR TO TRANSFER TO COURT EN BANC—Sept. 13, 1948

Now at this day, the Court having seen and fully considered the motion of the appellant for a rehearing in the above-entitled cause, or to transfer said cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled.

[fol. 48] IN SUPREME COURT OF MISSOURI

RECITAL AS TO APPEAL PAPERS

On December 13, 1948, Appellant filed in the Supreme Court of Missouri, its "Petition for Allowance of Appeal to the Supreme Court of the United States, addressed to the Honorable Laurence M. Hyde, Acting Chief Justice of the Supreme Court of Missouri, together with its "Jurisdictional Statement," and Bond in due form, in the penal sum of Five Hundred Dollars signed by Appellant as principal

and by Maurice J. O'Sullivan and John G. Killiger, Jr., as sureties. Upon due consideration thereof, there was made and entered the following:

Order

On this 13th day of December, 1948, on reading the petition of the Union National Bank of Wichita, Kansas, a corporation, the appellant herein, praying for an order herein allowing its appeal to the Supreme Court of the United States from the Supreme Court of the State of Missouri, and the record of said cause having been considered,

It Is Hereby Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Missouri, as prayed in said petition and the Clerk of the Supreme Court of the State of Missouri, shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit same to the Supreme Court of the United States within 40 days from the date hereof.

It Is Further Ordered that bond for security for costs be given in the sum of Five Hundred Dollars, and the undertaking heretofore furnished by appellant in said sum be and is hereby approved.

Given this 13th day of December, 1948.

(Signed) Laurence M. Hyde, Acting Chief Justice
of the Supreme Court of Missouri.

Said Petition for Allowance of Appeal and Jurisdictional Statement, captions and signatures omitted; are in words and figures as follows:

[fol. 49]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 13, 1948

On this 13th day of December, 1948, on reading the petition of the Union National Bank of Wichita, Kansas, a corporation, the appellant herein, praying for an order herein allowing its appeal to the Supreme Court of the United

States from the Supreme Court of the State of Missouri, and the record of said cause having been considered.

It Is Hereby Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Missouri as prayed in said petition and the Clerk of the Supreme Court of the State of Missouri shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit same to the Supreme Court of the United States within 40 days from the date hereof.

It Is Further Ordered that bond for security for costs be given in the sum of Five Hundred Dollars, and the undertaking heretofore furnished by appellant in said sum be and is hereby approved.

Given this 13th day of December, 1948.

Laurence M. Hyde, Acting Chief Justice of the Supreme Court of the State of Missouri.

[fol. 50]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 13, 1948

To the Honorable Laurence M. Hyde, Acting Chief Justice of the Supreme Court of Missouri.

The appellant respectfully prays for the allowance of an appeal herein to the Supreme Court of the United States.

1. Division One of this court filed an opinion on appeal on July 12, 1948, which is reported in 213 S.W. 2d 416. It overruled appellant's motion for rehearing and to transfer to the court In Banc, on September 13, 1948. This constituted final action of the court of last resort in the State of Missouri. This application is filed within ninety days as required by U.S.C.A., Title 28, Section 2101, as revised.

2. The opinion of this court affirmed the judgment of the Circuit Court of Jackson County, which denied appellant recovery upon a judgment of revivor, duly authenticated under U. S. C. A., Title 28, Section 687. The judgment of

revivor dated October 27, 1945, revived a judgment rendered December 8, 1927, for \$3,493.01. It was duly rendered under the laws of Colorado by the Colorado District Court at Denver. The Colorado statutes cited in the opinion were duly pleaded. The petition also pleaded that the judgment of revivor was entitled to full faith and credit under Section I, Article IV, of the Constitution of the United States. Appellant was entitled to execution on the judgment of revivor under Colorado laws.

3. The judgment below and the opinion filed herein denied your petitioner the benefit of the constitutional command (U. S. Const. Art. IV, Sec. 1), that the Colorado final judgment of revivor shall receive in the courts of Missouri such faith and credit as it was entitled to receive in Colorado.

4. The right asserted by petitioner to have the Colorado judgment enforced in the Missouri courts arises under the Constitution and a statute of the United States. (U. S. Const. Art. IV, Sec. 1, U. S. C. A. Title 28, Sec. 687, now Title 28, Sections 1738, 1739, revised and effective September 1, 1948). Since the existence of the federal right turns upon the legal effect of the proceedings in Colorado and the validity of the judgment there, the ruling of the Missouri courts are reviewable by the Supreme Court of the United States. (*Adams vs. Saenger*, 303 U. S. 59, 64; 82 L. ed. 649, 652; *Titus vs. Wallick*, 306 U. S. 282, 287, 288; 83 L. ed. 653, 657.)

5. This action was on the valid judgment of revivor and not upon the original judgment which gave rise to it, for which the constitutional mandate requires full faith and credit to be given in another state, although the forum would have been under no duty to entertain the action on which the judgment was founded.

Titus vs. Wallick, 306 U. S. 282, 291; 83 L. ed. 653, 659, and cases therein cited.

6. The opinion filed herein erroneously construed Section 1038, R.S. Mo. 1939, and applied it ex-territorially as a statute creating a conclusive presumption of satisfaction of the original Colorado judgment and not as a statute of limitations. Section 1038 was held to constitute a statute of both types in *Northwestern Brewers Supply Co. vs. Vorhees* (Mo. Sup.) 203 S. W. 2d, 422.

7. The opinion thereby refused to recognize the validity of the Colorado judgment of revivor which was duly rendered under the laws of Colorado. It denied full faith and credit thereto, by extritorially applying the Missouri statute to the cause of action underlying the Colorado final judgment of revivor.

The validity of Section 1038, R. S. Mo. 1939, as so construed; on the ground of its being repugnant to the U. S. Const. Art. V, Section 1, was directly drawn in question and the decision erroneously held in favor of its validity. [fol. 52] A real is therefore the proper remedy under U. S. C. A., Title 28, Section 1257, as revised and effective September 1, 1948.

8. The federal constitutional and statutory questions were directly involved. They are real and substantial and were expressly ruled upon in the opinion, pages 2, 3 and 4, where it was held that Section 1038 as construed, was not repugnant to U. S. Const. Art. IV, Section 1; or to U. S. C. A. Title 28, Section 687, now sections 1738 and 1739, as revised and effective September 1, 1948.

9. The denial of full faith and credit under U. S. Const. Art. IV, Section 1, and under U. S. C. A., Title 28, Sections 687, (now Title 28, Sections 1738, 1739, revised and effective September 1, 1948), was duly raised by appellant in its motion for new trial filed in the Circuit Court (Tr. 30-35) and in its motion for rehearing and to transfer to the court in Banc filed in this court. The right of the Colorado judgment of revivor to full faith and credit was pleaded in the original petition filed. (Tr. 1.)

10. Petitioner herewith files its separate jurisdictional statement; a bond for costs and a form of citation directed to counsel for respondent and an assignment of errors in conformity with U. S. Supreme Court rules 12 and 36. A supersedeas bond is not deemed necessary because petitioner was the losing party.

Wherefore, your petitioner respectfully prays that its appeal be allowed to the Supreme Court of the United States as provided by law.

Maurice J. O'Sullivan, John G. Killiger, Jr., Attorneys for Petitioner, 700 Columbia Bank Building, Kansas City, Missouri.

[fols. 52-63] Citation in usual form showing service on Fred L. Howard, filed December 13, 1948, omitted in printing.

[fols. 64-65] Bond on appeal for \$500.00, approved and filed December 13, 1948, omitted in printing.

[fol. 66] IN SUPREME COURT OF MISSOURI

ACKNOWLEDGMENT OF SERVICE

A citation to respondent in due form was duly signed by said Acting Chief Justice of the Supreme Court of Missouri on the 13th day of December, 1948, which was duly returned to the Clerk of this Court on December 17, 1948, with the following indorsed thereon:

"Due service of the foregoing citation, and receipt of a copy of Petition for Allowance of Appeal; Jurisdictional Statement; Order allowing Appeal, Bond on Appeal and this Citation is hereby acknowledged this 16th day of December, 1948.

(S.) Roach, Brenner & Wimmell, by Fred L. Howard, Attorneys for Respondent, Carl C. Lamb.

IN SUPREME COURT OF MISSOURI.

STIPULATION AND PRAECIPE FOR TRANSCRIPT OF RECORD—
Filed December 21, 1948.

It is stipulated and agreed by the parties hereto that the foregoing shall constitute a sufficient transcript of the record on appeal to present the matters in issue for hearing and determination in the Supreme Court of the United States.

The Clerk is requested to prepare and certify same as the transcript of the record on appeal and to transmit same

to the Supreme Court of the United States under his hand and the seal of the Supreme Court of Missouri.

[fol. 67] Counsel for Respondent waives statement directing their attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States.

Maurice J. O'Sullivan, 700 Columbia Bank Building,
Kansas City, Missouri, Attorney for Appellant.
[not legible], 2700 Fidelity Trust Building, Kan-
sas City, Missouri, Attorney for Respondent.

[fols. 68-71] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 72] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION
AS TO PRINTING OF RECORD—Filed February 8, 1949

The parties stipulate that printing the entire transcript as certified by the Clerk of the Supreme Court of Missouri is necessary for consideration of this appeal and that the "Assignments of Error upon which Appellant expects to rely" as printed on pages 6 and 7 of "Statement as to Jurisdiction", shall be deemed to be the statement of points upon which Appellant intends to rely under Rule 13, paragraph 9.

February 7, 1949.

Maurice J. O'Sullivan, Attorney for Appellant.

Daniel C. Brenner, Attorney for Respondent.

[fol. 72a] [File endorsement omitted]

[fol. 73] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUES-
TION OF JURISDICTION ETC.—January 31, 1949

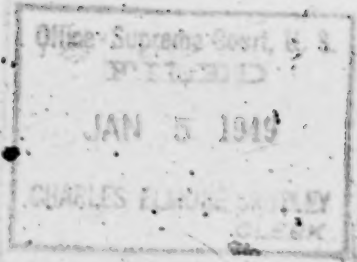
The statement of jurisdiction in this case having been submitted and considered by the Court, further considera-

tion of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits. Counsel are requested to discuss on briefs and oral argument the question whether the application for appeal was timely.

Endorsed on Cover: File No. 5002 Missouri Supreme Court, Term No. 300. The Union National Bank of Wichita, Kansas, Appellant, vs. Carl C. Landis. Filed January 5, 1949. Term No. 500 O. T. 1948.

(991)

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SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 500

**THE UNION NATIONAL BANK OF WICHITA,
KANSAS,**

Appellant,

vs.

CARL C. LAMB.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AS TO JURISDICTION

**MAURICE J. O'SULLIVAN,
JOHN G. KILLIGER, JR.,**
Counsel for Appellant.

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STATUTES CITED

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 500

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, A CORPORATION,

Appellant,

vs.

CARL C. LAMB,

Respondent.

JURISDICTIONAL STATEMENT

For its jurisdictional statement, appellant states

(a) This court is invested with jurisdiction under Public Law 773, approved June 25, 1948, effective September 1, 1948, U.S.C.A., Title 28, Sections 1257 and 2106. Jurisdiction is specifically based upon subdivision 2 of Section 1257, because the final decision of the Supreme Court of Missouri was in favor of the validity of Section 1038, R.S. Mo. 1939, Vol. 1, page 284, as construed by said court, the validity of which was drawn in question as repugnant to U. S. Const. Art. IV, Section 1 and U.S.C.A., Title 28, Section 687, new sections 1738 and 1739, as revised and effective September 1, 1948.

(b) 1. The validity of section 1038 Rev. Sta. Mo. 1939 found at Vol. I, page 284, Rev. Statutes Mo. 1939, as construed by the opinion of Division One of the Supreme Court of Missouri, reported 213 S. W. 2d, 416, contravenes and is repugnant to Article IV, Section 1, of the Constitution of the United States and to U.S.C.A., Title 28, Section 687, new sections 1738 and 1739 as revised and effective September 1, 1948.

2. Section 1038, R.S. Mo. 1939, reads:

"Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

3. 3 Colo. Ann. St. 1935, Ch. 93, Sections 2, page 1036, and Chapter 6, Section 54(H), page 210, read:

"Sec. 2: All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record, either at law or in equity for any debt, damages, costs or any other sum of money, shall be liable to be sold on execution to be issued upon such judgment; . . . and, provided, further, that execution may issue on such judgment, to enforce the

same, at any time within twenty years from the entry thereof, but not afterwards, unless revived as provided by law.

"A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. * * * A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for a like period as an original judgment."

4. Petitioner by reference adopts Paragraphs numbered 2 to 9 both inclusive of its Petition for Allowance of Appeal to the Supreme Court of the United States, as fully as if here set forth at length.

(c) Final judgment of the Missouri Supreme Court in the above entitled cause was rendered by its action in overruling motion for rehearing and motion to transfer to the court In Banc on September 13, 1948. Petition for appeal to this court was presented December 13, 1948.

(d) 1. Appellant filed its petition in the Circuit Court of Jackson County, Missouri, to recover on a judgment of revivor entered forty-seven days before, or on October 27, 1945, by the District Court of Colorado, at Denver. The judgment revived on October 27, 1945, was rendered December 8, 1927, on personal service, for \$3493.01 and costs. Respondent's plea of section 1038, R.S. Mo. 1939, in bar, was sustained and judgment was entered for defendant. It was affirmed on appeal by the opinion of Division One of the Supreme Court of Missouri, which denied motion for rehearing and to transfer to the court In Banc on September 13, 1948. No further proceedings were open in the Missouri courts.

2. The final opinion of Division One of the Supreme Court of Missouri erred in substantive questions of federal

law in material matters of general application and of public importance in that the Colorado District Court was vested with and duly exercised lawful jurisdiction under the laws of Colorado in rendering its judgment of revivor and for recovery thereon, with right of execution under the laws of that state. Such judgment was final when suit was filed in Missouri. It was not open to collateral attack. The Missouri courts were precluded from a redetermination of the issues duly adjudicated in Colorado. Missouri courts were bound by the face of the Colorado judgment of revivor as rendered.

3. Section 1038, R.S. Mo., 1939, had no application as a statute of limitations. The Missouri action was filed forty-seven days after the entry of the judgment of revivor. Missouri courts were without constitutional power to project its statute as a statute creating a presumption of payment to nullify or to refuse full faith to the Colorado adjudication which revived the original judgment as if it had originally been rendered on October 27, 1945. The general law is correctly stated in 49 C.J.S. 1020, sec. 549, to be:—

“The revival of a judgment by regular proceedings reinvests it with all the effect and conditions which originally belonged to it and which have been wholly or partly suspended by lapse of time.”

3 *Colo. Ann. Stat. 1935, Ch. 93*, which the opinion cites, so provides.

4. Respondent, by his residence therein prior to the original judgment in 1927 and appellant, by suit, both elected to accept Colorado laws to govern their rights and liabilities. Respondent benefitted while appellant was adversely affected by the amendment effective March 7, 1935, of Section 2, Ch. 88, 1935 Ann. Colo. St., which was duly pleaded in the petition, (Tr. 4), whereby interest on judgments

was reduced from 8% to 6%. One of the primary purposes of U. S. Const. Art. IV, Section 1, and of its counterpart in the Articles of Confederation, was to prevent a renunciation and escape from existing liabilities by removals to another state. Respondent accepted Colorado law which provided for revival of judgments within twenty years, by residing in that state. His removal to Missouri did not substitute its laws for obligations theretofore adjudicated under the laws of Colorado. The contrary construction of the Missouri statute contravenes the constitutional mandate of full faith and credit.

(e) Cases which are believed to sustain the jurisdiction of this court are:

Jacobs v. Marks, 182 U. S. 583, 45 L. Ed. 1241;

Kenny v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411, 64 L. Ed. 638;

Broderick v. Rosner, 294 U. S. 629, 79 L. Ed. 1100;

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653;

Roche v. McDonald, 275 U. S. 449, 72 L. Ed. 365;

Adam v. Saenger, 303 U. S. 59, 64, 82 L. Ed. 649;

Morris v. Jones, 329 U. S. 545, 91 L. Ed. 488;

Cowser v. Hamilton, 224 U. S. 243, 56 L. Ed. 749;

Barber v. Barber, 323 U. S. 77, 89 L. Ed. 82.

(f) The petition filed in the Circuit Court of Jackson County included an authenticated copy of the judgment of revivor and proceedings thereon and of the original judgment of December 8, 1927, certified in accordance with U. S. C. A., Title 28, Section 687 (Tr. 6-13). The petition pleaded that the judgment of revivor was entitled to full faith and credit under the above statute and under U. S. Const. Art. IV, Sec. 1.

Judgment was rendered for defendant (Tr. 29). Motion for new trial filed in due time was overruled and an appeal

was perfected to the Supreme Court of Missouri (Tr. 30-37). The motion for new trial specifically complained of the denial of full faith and credit, contrary to U. S. C. A., Title 28, Section 687 and to U. S. Const. Art. IV, Section 1.

The opinion of Division One of the Supreme Court of Missouri sustained the validity of Section 1038, R. S. Mo. 1939, as therein construed. Appellant's motion for rehearing and to transfer to the court In Banc, specifically raised the denial of full faith and credit and that the construction of Section 1038 R. S. Mo. 1939, contravened and was repugnant to the Federal Statute and to the U. S. Const. Art. IV, Section 1. Motion for rehearing and to transfer to the court In Banc was overruled September 13, 1948. No further procedure was provided by Missouri law.

(g) Assignments of Error upon which Appellant expects to rely.

1. The judgment of the trial court and of the Supreme Court of Missouri on appeal erred in denying full faith and credit to the valid, authenticated judgment of revival of the Colorado District Court and the Colorado statutes which were duly pleaded and proved, in contravention to U. S. Const. Art. IV, Section 1 and to U.S.C.A., Title 28, Section 687, now Sections 1738, 1739, as revised and effective September 1, 1948.

2. Section 1038, R.S. Mo. 1939, (volume 1, page 284), as construed and applied by the opinion of the Supreme Court of Missouri operates extraterritorially contrary to U. S. Const. Amendment XIV, Section 1, and contravenes and is repugnant to U. S. Const. Art. IV, Section 1 and to U.S.C.A., Title 28, Section 687, (now sections 1738 and 1739 as revised).

3. The judgment for defendant was erroneous and the Supreme Court of Missouri erred in refusing to reverse

sane and in failing to direct entry of judgment for appellant upon the uncontroverted pleadings and proof. It thereby denied the rights secured to appellant under U. S. Const. Art. IV, Section 1, to have full faith and credit accorded in the Missouri courts to the valid and duly authenticated and proved valid judgment of revivor rendered by the Colorado District Court at Denver.

For all of which errors petitioner prays that the judgment of the Supreme Court of Missouri in the above entitled cause be reviewed and reversed by the Supreme Court of the United States and that entry of judgment be directed in favor of petitioner and for its costs.

MAURICE J. O'SULLIVAN,

JOHN G. KILLIGER, JR.,

Attorneys for Petitioner.

700 Columbia Bank Building,

Kansas City, Missouri.

APPENDIX "A"

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE,
APRIL SESSION, 1948

No. 40684 *

THE UNION NATIONAL BANK OF WICHITA, KANSAS, a Cor-
poration, *Appellant*,

vs.

CARL C. LAMB, *Respondent*

Action to recover on a Colorado revived judgment. A trial without a jury resulted in a finding and judgment for defendant and plaintiff appealed. The appeal lies to the supreme court because the amount in dispute exceeds the sum of \$7500. See Art V, Sec. 3, Constitution.

December 6, 1927, plaintiff obtained a judgment for \$3,493.01 against defendant in the district court of Denver, Colorado. No payment was made on this judgment. October 27, 1945, nearly 18 years after original rendition, the Colorado judgment was revived by getting extraterritorial personal service upon defendant in Jackson County, Missouri. December 13, 1945, plaintiff filed the present cause to recover on the revived judgment.

Defendant makes two defenses, first, that plaintiff's cause is barred by Sec. 1038 R.S. 1939; Mo. RSA, Sec. 1038, and second, that the judgment of revival in Colorado was not upon personal service as required by Sec. 1038. This section provides: "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied *after the expiration of ten years from the date of the original rendition thereof*, or if the same has been revived upon *personal service* duly had upon the defendant or defendants therein, then *after ten years from and after such revival*, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years

from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever" (italics ours).

The Colorado statute of limitation on a judgment is 20 years, and the lien expires in 6 years. 3 Colo. Ann. Stat. 1935, Ch. 93, Sec. 2. This section, among other things, provides that "from and after twenty years from the entry of final judgment in any court of this state, the same shall be considered as satisfied in full, *unless revived as provided by law.*" If the present judgment had not been revived it would have been barred in this state in 10 years from the date of its original rendition, notwithstanding the 20 years limitation of the Colorado statute. Sec. 1038, *supra*; Northwestern Brewers Supply Co. v. Vorhees (Mo. Sup.), 203 S. W. (2d.) 422, and cases therein cited; *The question is, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of its original rendition the limitation fixed for revival by Sec. 1271 R. S. 1939, Mo. RSA Sec. 1271.* This section is as follows: "The plaintiff or his legal representative may, at any time within ten years, sue out a scire facias to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue."

Plaintiff contends that to bar the present revived judgment would be contrary to the full faith and credit provision of the federal Constitution, Art. IV, Sec. 1, which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." But "it has uniformly been held that each of the states of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another state without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States." 11 Am. Jur. Sec. 192, p. 507; 34

C. J., Sec. 1578, p. 1110; *Northwestern Brewers Supply Co. v. Vorhees*, supra. It is the general rule that the *lex fori* governs the limitation of actions within its borders, and that the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the *lex loci*. "In short the *lex fori* determines the time within which a cause of action shall be enforced." 11 Am. Jur. Secs. 191, 192, pp. 505, 507; *Northwestern Brewers Supply Co. v. Vorhees*, supra.

Now to the question, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of rendition of the original judgment? We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Sec. 1038.

Plaintiff cites many cases from this and other jurisdictions, both federal and state. Among these are *Crim. v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 LRA 502; *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 488, 168 ALR 656; *Milwaukee County v. White Company*, 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. 220; *Adams v. Saenger et al.*, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649. *It is not necessary to refer to all these cases; none is pertinent to the question of limitation in hand except Union Fire Ins. Co. v. Hansen*, 237 Mo. App. 1110, 180 S. W. (2d) 265, by the Springfield Court of Appeals, and *Kratz v. Preston*, 52 Mo. App. 251, by the Kansas City Court of Appeals. The Hansen case was on a Nebraska judgment rendered December 7, 1932, and revived March 9, 1943, more than 10 years after original rendition. The trial court found for the plaintiff and the defendant appealed; the judgment was affirmed. The court said: "Article IV, section 1, of the United States Constitution, provides that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' On March 9, 1943, the Nebraska judgment against defendant was duly revived in Nebraska under the laws of Nebraska, as thus certified. It was then a good judgment in Nebraska. Full faith and credit must be given to the action of the district court of Nebraska. The trial court, therefore, could do nothing else than enforce the said Nebraska judgment in Missouri."

No case was cited; limitation was not considered, and Sec. 1038 was not mentioned.

The Kratz case was an action on a Pennsylvania judgment rendered July 26, 1861, and revived February 11, 1891, nearly 30 years after original rendition. What is now Sec. 1038 was Sec. 6796 R. S. 1889, when the Kratz case was decided, and the limitation on a judgment was then 20 years. There was no revival provision in the section at that time. It was held in the Kratz case that limitation began to run from the date of revival and not from the date of the original judgment. What is now Sec. 1038 was amended in 1895, Laws 1895, p. 221, and in 1899, Laws 1899, p. 300. The section in the statute of 1889, as stated, fixed the limitation of a judgment at "twenty years from the date of rendition." Since 1899, the section has not been changed, and as appears in Sec. 1038, the limitation is fixed at "ten years from the date of the *original* rendition" (italics ours). It was in the Act of 1899 that the term *original* was first inserted. Also, it was in the Act of 1899 that the revival provision was first inserted. In view of the language in Sec. 6796 R. S. 1889, "twenty years from date of rendition"; and in view of the then absence of any provision as to limitation on a revived judgment, the Kratz case ruling can be understood because the suit on the revived judgment was filed shortly after its rendition. The date when filed does not appear, but the case was decided January 2, 1893, less than two years after the judgment was revived.

Under Sec. 1038 a domestic or foreign judgment is barred in 10 years from the date of its original rendition, unless it is revived or payment made, and under Sec. 1271, a domestic judgment, if revived at all, must be revived within "ten years from the rendition of the judgment." It will be noted that Sec. 1271, the revival section, *does not say "from the original rendition"*; hence a second, third, etc., revival may be had if within 10 years from the last one. *Definitely, it is the law of this state that a foreign judgment, absent revival, or a payment thereon as provided in Sec. 1038, is barred in 10 years from the date of its original rendition regardless of what the limitation period may be under the law of the state where the*

judgment was rendered. *Northwestern Brewers Supply Co. v. Vorhees, supra.* And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum.

Our ruling, *supra*, disposes of this appeal, hence it is not necessary to rule the second defense that the *service* upon defendant for revival of the Colorado judgment was not *personal service* within the meaning of that term in Sec. 1038.

The judgment should be affirmed and it is so ordered.

(Signed) John H. Bradley, Commissioner. Per Curiam: The foregoing opinion by Bradley, C., is adopted as the opinion of the Court. All the Judges concur.

Dalton, C. concurs.

Van Osdol, C. concurs.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, APPELLANT,

VS.

CARL C. LAMB, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR APPELLANT.

MAURICE J. O'SULLIVAN,
Counsel for Appellant.

JOHN G. KILLIGER, JR.,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, APPELLANT,

VS.

CARL C. LAMB, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

OPINION BELOW.

The opinion of the Supreme Court of Missouri (R. 19)
is reported in 216 S. W. 2d 416.

JURISDICTION.

(A)

The application for appeal was timely.

On January 31, 1949, this court ordered:

"Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits. Counsel are requested to discuss on briefs and oral argument the question whether the application for appeal was timely."

28 U. S. C., Ch. 133, Section 2101 (c), as revised and effective September 1, 1948, provides that an appeal under 28 U. S. C., Section 1257 (b), as revised, "shall be taken or applied for within ninety days after the entry of such" (final) "judgment."

Final judgment was rendered September 13, 1948, in Division One of the Supreme Court of Missouri, by overruling Appellant's "Motion to Rehear or to Transfer the Cause to the Court *En Banc*" (R. 23). That date was the 256th day of 1948. Ninety days thereafter, or the 346th day, was Sunday, December 12, 1948. Such computation excludes the first and includes the last day, which was Sunday. The application for appeal was filed and it was allowed on the first secular day following, or Monday, December 13, 1948.

The application for appeal was timely under the method of computation of time consistently approved by this Court. *F. R. C. P. No. 6(a)*; *Street v. U. S.*, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72. This method of computing time is now followed almost universally in legal matters and in commercial affairs.

Mr. Chief Justice Vinson concurred with Mr. Justice Rutledge in an opinion which cited numerous cases and ruled that an application for appeal under similar circumstances and a comparable statute was timely, in *Sherwood Bros. v. District of Columbia*, (App. D. C., 1940) 113 F. 2d 162, Sub. 1-3. See also, *Wilson v. Southern Ry. Co.*, (C. C. A. 5) 147 F. 2d 165, and 52 Am. Jur. 342, 347, Secs. 17 to 21, and supplement.

(B)

Jurisdiction is vested under Public Law 773, effective September 1, 1948.

The statement printed under Rule 12, shows that jurisdiction is vested under 28 U. S. C., Sections 1257(b) and 2106, as revised and effective September 1, 1948, because the final decision of the Supreme Court of Missouri sustained the validity of Section 1038, R. S. of Missouri, 1939, Vol. 1, page 284, which was directly drawn in question as repugnant to U. S. Constitution, Art. IV, Section 1, and 28 U. S. C. 687, now Section 1738, as revised and effective September 1, 1948. The construction of the state statute contravenes and is repugnant to U. S. Const., Art. IV, Sec. 1, Amendment XIV, Section 1, and to 28 U. S. C. 687, now Section 1738. Review by appeal is proper. *Angel v. Bullington*, Sub. 4, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832.

STATUTES INVOLVED.

The statute of the State of Missouri, the validity of which is involved, as construed by the Supreme Court of Missouri (R. 19), is Section 1038, R. S. Mo., 1939, Vol. 1, page 284, which reads:

"Every judgment, order or decree of any court of record of the United States, or of this or any other

state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid; and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

The statutes of the State of Colorado (R. 20) which are involved and which (together with the judgment of revivor rendered by the Colorado District Court at Denver (R. 4) thereunder) were denied Full Faith and Credit by the Missouri Courts, are 3 Colo. Ann. St., 1935, Ch. 93, Section 2, page 1036, and Chapter 6, Section 54(H), page 210, which provide:

"Sec. 2: All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record, either at law or in equity for any debt, damages, costs or any other sum of money, shall be liable to be sold on execution to be issued upon such judgment; * * * and, provided, further, that execution may issue on such judgment, to enforce the same, at any time within twenty years from the entry thereof, but not afterwards unless revived as provided by law * * *

"A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. * * * A revived

judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for a like period as an original judgment."

STATEMENT OF THE CASE.

This action was instituted December 13, 1945, in the Circuit Court at Kansas City, Missouri, on a final judgment of revivor rendered by the Colorado District Court at Denver, on October 27, 1945, in conformity with the Colorado statutes above quoted (R. 4). The aggregate sum due when the trial court entered judgment denying recovery on June 27, 1947, was \$8,044.67. The original judgment of December 8, 1927, for \$3,493.01 and costs was rendered on defendant's note, following personal service of summons upon him at his residence in Denver (R. 3).

A copy of the original judgment and of the judgment of revivor of October 27, 1945, authenticated under 28 U. S. C. 687, now Section 1738, and a similar Section 1864, R. S. Mo., 1939, were attached and made a part of the petition (R. 3, 4). Respondent's answers to interrogatories admitted he was personally served with and that he received copies of the Notice of Motion and Motion to Revive as shown at R. pp. 6, 8. The authenticated copies of both judgments, with the interrogatories and Respondent's answers thereto, were offered and introduced in evidence over Respondent's objections that they were inadmissible because the judgments were barred by limitations prescribed by Section 1038, R. S. Mo., 1939. Further objections were made that the original judgment was not revived within ten years and that the revivor was based upon the notice and motion to revive, which were served upon him in Kansas City, Missouri, by a Deputy Sheriff of Jackson County and also by registered United States

mail, which was not "personal service" as contemplated by Section 1038 (R. 9, 12).

Respondent filed an answer (R. 5) but offered no evidence. Counsel stipulated that the applicable laws of Colorado were to be considered (R. 12).

The Colorado laws pleaded in the petition, with the decisions thereon, were entitled to judicial notice by *Missouri Civil Code, Section 847.54, Laws of Mo., 1945, page 353*. The petition averred that the District Court of Colorado at Denver had general jurisdiction of all cases at law and in equity under *Colorado Code of Civil Procedure, Volume 1, 1935 Colo. Ann. St.*, and that the original judgment and the judgment of revival complied with and were authorized by *Chapter 88, Section 2, as amended March 7, 1935*, and that the plaintiff was entitled to have execution on the judgment of revivor in the sum of \$3,493.01, with simple interest at 8% per annum from December 8, 1927, to March 7, 1935, and at 6% per annum thereafter until paid, together with the costs assessed. Recovery was prayed accordingly, with costs, and that the same full faith and credit be accorded thereto in Missouri, under U. S. Const., Art. IV, Sec. 1, that the judgment of revivor was entitled to have and was given under Colorado law (R. 1, 3).

Appellant filed its motion for a new trial in due time after entry of judgment for defendant (R. 13, 16). It challenged the denial of the full faith and credit secured by *U. S. Constitution, Article IV, Section 1*, and by *28 U. S. C. A. 687*, and by a similar state statute, *Section 1864, R. S. Mo., 1939*, and the refusal of the trial court to follow the duly cited controlling decisions, which were binding upon it (R. 14, 16). Upon overruling its motion for new trial, Appellant perfected its appeal to the Supreme Court

of Missouri (R. 17), where the case was assigned to Division One, which filed its opinion on July 12, 1948 (R. 19).

Within due time, Motion to Rehear and to Transfer to the Court *En Banc* were filed, in which Appellant specifically challenged the denial of Full Faith and Credit to the Colorado judgment of revivor and that the construction of Section 1038, R. S. Mo., 1939, contravened and was repugnant to U. S. Constitution, Article IV, Section 1 and to 28 U. S. C. A., Section 687; and to controlling cases duly cited therein (R. 23, 34). The motions were both overruled on September 13, 1948, which constituted final judgment (R. 34). No further procedure was authorized by Missouri law.

An appeal to this Court was allowed by the Acting Chief Justice of the Supreme Court of Missouri, on Monday, December 13, 1948 (R. 35).

SPECIFICATION OF ERRORS.

1. The judgment of the trial court and of the Supreme Court of Missouri on appeal erred in denying full faith and credit to the valid, authenticated judgment of revival of the Colorado District Court and the Colorado statutes which were duly pleaded and proved; in contravention to U. S. Const., Art. IV, Section 1 and to U. S. C. A., Title 28, Section 687, now Sections 1738, 1739, as revised and effective September 1, 1948 (R. 40).

2. Section 1038, R. S. Mo., 1939 (Volume 1, page 284), as construed and applied by the opinion of the Supreme Court of Missouri operated extraterritorially contrary to U. S. Const., Amendment XIV, Section 1, and contravenes and is repugnant to U. S. Const., Art. IV, Section 1 and to 28 U. S. C. A., Section 687 (now sections 1738 and 1739 as revised) (R. 40).

3. The judgment for defendant was erroneous and the Supreme Court of Missouri erred in refusing to reverse same and in failing to direct entry of judgment for appellant upon the uncontroverted pleadings and proof. It thereby denied the rights secured to appellant under U. S. Const., Art. IV, Section 1, to have full faith and credit accorded in the Missouri courts to the valid and duly authenticated and proved valid judgment of revivor rendered by the Colorado District Court at Denver (R. 40, Jurisdictional Statement, 6, 7).

SUMMARY OF ARGUMENT.

1. Under the laws of Colorado, the 1927 judgment was reanimated by the judgment of revivor with a new right of enforcement from October 27, 1945, in the same manner and for a like period as an original judgment. All issues necessarily involved therein were concluded, under the Colorado law. Such issues were not subject to readjudication in Colorado, nor in Missouri, after the judgment became final. Limitations and presumptions of payment were avoided and reset to run anew from October 27, 1945.

2. The opinion of the Supreme Court of Missouri did not purport to determine the validity and effect of the judgment of revivor under Colorado law, which was a mandatory duty imposed by U. S. Constitution, Article VI, under the issues presented by the demand for full faith and credit secured by U. S. Constitution, Article IV, Section 1, and 28 U. S. C. 687. It erred in refusing to enforce the Colorado judgment of revivor because a similar judgment would not have been rendered in Missouri if the proceedings had originated in Missouri in the first instance. The Missouri courts erred in denying full faith and credit to the valid, authenticated judgment of the

Colorado District Court and to the Colorado statutes which were duly pleaded and proved. The judgment and Section 1038, R. S. Mo., 1939, as construed and applied are repugnant to U. S. Constitution, Article IV, Section 1, and to 28 U. S. C. 687.

3. The Missouri courts erred contrary to the foregoing and to the 14th Amendment, Section 1, in extraterritorially extending its statutes to readjudicate the underlying cause of action which was conclusively adjudicated between the parties by the Colorado judgment of revivor.

4. The judgment of revivor was a continuation of the original action. Service of the motion to revive and notice upon defendant in Missouri was valid under Colorado law. It met the requirements of due process of law and bound the Missouri courts to recognize it under Article IV, Section 1, and 28 U. S. C. 687.

ARGUMENT.

I.

The Colorado judgment of revivor reanimated the 1927 judgment with a new right of enforcement from October 27, 1945, in the same manner and for a like period as an original judgment. All questions necessarily involved were conclusively barred thereby. Limitations were avoided and reset to run anew from that date.

The Colorado statutes quoted, pages 4-5, specify that a revived judgment "may be enforced and made a lien in the same manner and for a like period as an original judgment." "Execution may issue on such judgment to enforce the same, at any time within twenty years from the entry thereof but not afterward, unless revived as provided by law."

La Fette v. Salisbury, 43 Colo. 248, 95 Pac. 1065, 1066, ruled that

"The effect of a judgment reviving a judgment as an adjudication of all questions necessarily involved does not differ from that of other judgments. In such proceedings the judgment debtor must interpose such defenses as he may have, or they will be forever barred by the judgment of revivor. Freeman on Judgments, Sec. 448."

Freeman is frequently cited in Colorado cases. 2 *Freeman on Judgments*, 5th Ed., p. 2290, Sec. 1102 states:

"The effect of a judgment entered upon scire facias as an adjudication does not differ from that of other judgments. It cannot be collaterally avoided for

mere error or irregularity, and until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all persons properly made parties thereto, so that they cannot afterwards insist that there was no such judgment, nor that it had been paid prior to its revival, or released or discharged by proceedings in bankruptcy or otherwise. But a mere judgment of revivor does not otherwise add anything to the efficacy of the original judgment, since it is not a readjudication of the subject matter but is simply a continuation of that judgment in force and effect."

Kuykendall v. Tod, (C. C. A. Colo., 1915) 219 Fed. 707, cert. den. 238 U. S. 635, 54 L. Ed. 1499, 35 S. Ct. 939, is closely analogous. Judgment of the Colorado Federal District Court was affirmed, in an action filed in 1913 to recover on a 1912 Wyoming judgment, which revived a judgment originally rendered in 1895. The six year Colorado statute of limitations barring foreign judgments was pleaded in defense to the Wyoming judgment of 1895, despite the revivor. It was ruled that limitations began to run anew from the date of revivor, whether the Wyoming proceeding was considered as new, or as a continuation of the original action. The judgment of revivor was held to avoid the statute of limitations and to set it running again from its date; to grant a new right of enforcement and to reinstate the old judgment. The long established practice in the English courts was considered whereby revival by *scire facias* prevented the original judgment from being considered as standing, within the meaning of the word in the expression "ten years standing."

31 Am. Jur. 61, Section 390, declares:

"The revival of a judgment makes it effective for the designated ensuing period of years, whether it was dormant because of the lapse of the statutory period or because of the death of a party thereto. * * * In addition to an affirmation of the fact that the judgment is unpaid, the general effect of the revival of a judgment dormant because of the lapse of the statutory period is to restore it to life; it is generally regarded as a reanimated judgment, not a new one."

49 C. J. S. 1020, Sec. 549, states:

"The revival of a judgment by regular proceedings reinvests it with all the effect and conditions which originally belonged to it and which have been wholly or partly suspended by lapse of time."

A judgment of revival was held to be a remedy for avoidance of the statute of limitations and to avoid a presumption of payment from lapse of time, in *Mo. & Ark. L. & M. Co. v. Greenwood*, 249 U. S. 120, 63 L. Ed. 538, 39 S. Ct. 202. Additional authorities urged and discussed at length in Appellant's Motion to Rehear (R. 29, 34), are adopted by reference for brevity.

The judgment of the trial court and of the Supreme Court of Missouri on appeal erred in denying full faith and credit to the valid, authenticated judgment of revival of the Colorado District Court and to the Colorado statutes which were duly pleaded and proved, contrary to U. S. Constitution, Article IV, Section 1, and 28 U. S. C. 687, now Section 1738 as revised and effective September 1, 1948. Section 1038, R. S. Mo., 1939, as construed and applied by the Supreme Court of Missouri, is repugnant to the foregoing and to U. S. Const., Amendment XIV, Section I, and is therefore void.

A.

The errors of the Court below are obvious from the questions stated in its final opinion and from the rulings made contrary to controlling authorities.

The questions are quoted. The rulings contrary to controlling authorities are quoted in italics, viz.:

"The question is, Does Section 1038 bar the revived judgment because it was not revived within 10 years from the date of its original rendition the limitation fixed for revival by Sec. 1271. This section is as follows: 'The plaintiff or his legal representative may, at any time within ten years, sue out a *scire facias* to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no *scire facias* shall issue' " (R. 20).

"It is the general rule that the *lex fori* governs the limitation of actions within its borders, and that *the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the lex loci*. In short the *lex fori* determines the time within which a cause of action shall be enforced. 11 Am. Jur., Secs. 191, 192, pp. 505, 507; *Northwestern Brewers Supply Co. v. Vorhees*, *Supra*."

"Now to the question, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of rendition of the original judgment? We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Section 1038" (R. 21).

"And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said Section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum" (R. 22).

The judgment was for defendant upon the merits. It was not a judgment of dismissal (R. 12, 13). Appellant's rights were thereby concluded everywhere. *Annotation, 149 A. L. R. 575, 576.*

The opinion stated that this action was to recover on the Colorado revived judgment rendered on October 27, 1945, after personal service upon defendant in Missouri. It did not mention that a notice and motion to revive was served on defendant in conformity with Colorado law, and not a writ of *scire facias* (R. 19).

Its first query was of possible bar by limitations under Section 1271, which is quoted, but which Respondent did not interpose as a defense in his answer (R. 5). That is a mere procedural section authorizing *scire facias* to revive domestic judgments and their liens, similar to the writ first given by 13 Edw. 1, which was once in force in Missouri (*Garner v. Hayes*, 3 Mo. 346). The irrelevancy of that

section to govern procedure in Colorado, which long since abandoned the writ, is patent.

The anomalous decision did not remotely purport to determine the validity and effect of the judgment in Colorado, so as to give it the same credit, validity and effect in Missouri, *which were the issues presented by the demand for full faith and credit secured by U. S. Constitution, Article IV, Section 1.* The determination of those issues was a mandatory duty under Article VI of the Constitution, as the supreme Law of the Land.

The opinion declared, but then did not apply the rule to the judgment of revivor, that "the *lex fori* determines the time within which an action shall be enforced." That judgment was within the time provided by Colorado law. The Missouri action was filed 47 days thereafter. The ten year limitation statute had no possible application.

Corollary to the rule above quoted and of equal merit, are the rules that:

(a) *A statute of limitations is a shield but not a sword.*

Annotation, 164 A. L. R. 1387.

(b) *Limitations affect the remedy but not the right. Denial of recovery because the action is barred by limitations of the forum does not extinguish the cause of action nor bar recovery in other jurisdictions in which longer periods of limitation govern.*

A. L. I., Restatement of the Law of Judgments, Sec. 49, Comment (a).

Annotation, 164 A. L. R. 693.

53 C. J. S. 922, Sec. 6(b).

The opinion relied upon erroneous dicta declared in the ill advised action filed by *Northwestern Brewers Supply Co. v. Vorhees*, (Mo. Sup., 1947) 203 S. W. 2d 422. That

case denied recovery on a Wisconsin judgment rendered 14 years before, which was not barred by limitation in Wisconsin until 20 years after its rendition. Section 1038 was properly held to bar the action as a 10 year statute of limitations. It erroneously ruled also that the conclusive presumption of payment of a judgment after ten years, which the Missouri statute also created, applied to the Wisconsin judgment, contrary to the Wisconsin statute. The latter ruling was erroneous dicta and unnecessary to the decision. Nevertheless, when the judgment became final, the parties were bound thereby. *A. L. I., Restatement, Judgments, Section 48.* It constituted both a shield and a sword which thereafter barred recovery on the Wisconsin judgment everywhere, as it must be assumed that full faith and credit will be accorded to valid judgments by courts elsewhere, if not always in Missouri. The distinction between limitations which prohibit an action and the presumption of payment which obliterates a debt, is shown in 34 *Am. Jur.* 16, Section 6.

The *Vorhees* case purported to follow *M'Elmoyle v. Cohen*, 13 Pet. 326, 10 L. Ed. 177, and *Bacon v. Howard* 20 How. 22, 15 L. Ed. 811. Both ruled that a State may legislate upon the remedy in suits on judgments of other states, "EXCLUSIVE OF ALL INTERFERENCE WITH THEIR MERITS." The emphasized qualifying restriction which both cases declared, was wholly disregarded. The Missouri statutory presumption of payment was applied to destroy the plaintiff's rights under the Wisconsin judgment and statute notwithstanding that the creditor was entitled to enforce it there for the remainder of the 20 year limitation period.

Actions on foreign judgments may lawfully be barred by reasonable limitation periods after their dates of rendition. Full faith and credit and recognition of their validity

is not thereby denied. The merits and right to enforce the judgment in the State of its origin or elsewhere is not affected by such refusal. Each State may limit the life of judgments rendered therein. They may not lawfully superimpose such limitations of life, to decree the death of foreign judgments. The duration of judgments is a matter within the province of the State which gives them life. The laws of the several States are of equal dignity. The rules stated accord them the equal respect to which all are entitled.

Appellant demanded but Missouri denied the faith and credit secured by Art. IV, Sec. 1, to the judgment of revival which was valid under Colorado law for twenty years from October 27, 1945. It was lawfully entitled to recover thereon in any court, state or federal, within the limitation periods applicable in any jurisdiction where the defendant might be found. The judgment for defendant clearly erred, but until it is reversed, the defendant is armed with a sword to bar recovery in all courts which respect the command of the federal Constitution to accord full faith and credit to judgments of other States, including the Colorado court which rendered the judgment of revival to which Missouri's Courts erroneously denied such faith and credit.

Angel v. Bullington, (N. C., 1947) 330 U. S. 183, 67 S. Ct. 657; 91 L. Ed. 832, is illustrative. The Supreme Court of North Carolina denied Bullington recovery on notes made in Virginia, because a local statute prohibited deficiency judgments after foreclosure of a mortgage or deed of trust. That court held that the statute pertained to the adjective law and was a limitation upon the jurisdiction of the courts of that State. Bullington did not appeal but filed a new action in the Federal District Court. This Court ruled that for the purposes of *res judicata*, the significance of what a court says it decides, is controlled by the issues

which were open for decision. Federal Constitutional claims were plainly and reasonably made in the action in the State court which were there denied by saying that the statute dealt with procedure but not with substantive matters. The sufficiency of the grounds of denial of a federal right was held to be questions for this Court.

This Court ruled that the merits of the controversy were adjudged by the State court, since that court, or this Court on appeal, might have decided that the statute did not bar Bullington's first action. Since Bullington permitted the State court judgment to become final, it was held to be *res judicata* and a bar to the action in the Federal District court. All issues which were or could have been determined in an action in which the judgment became final, were held to be final and conclusive between the parties thereafter.

Respondent had full notice and opportunity to oppose the Colorado judgment of revivor. Final judgment therein was *res judicata* of all issues which were raised by his collateral attack in Missouri.

The Missouri Court did not avoid the denial of the federal right of full faith and credit to the Colorado judgment of revivor, by declaring that "*the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the lex loci,*" or that a foreign judgment is barred "*unless the revival was within ten years from the date of original rendition,*" or that "*the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum.*"

11 Am. Jur. Section 192, page 508, upon which the opinion also relied, cites *Cygkendale v. Doe*, 129 Iowa 453, 105 N. W. 698, 3 L. R. A. (N. S.) 449, 113 Am. St. Rep. 472, in support of the text reading:

"A judgment entered upon a promissory note within the time permitted by the laws of the State in which the judgment is entered, cannot be defeated in another state because its statute of limitations had barred the debt before the judgment was entered."

The *Cuykendall* case adjudged that full faith and credit must be accorded to a Delaware judgment which was rendered under the terms of a cognovit note delivered in that state 16 years before, although such clauses were invalid in Iowa and a similar judgment was precluded by Iowa limitation laws. The Court observed that the debtor, as a resident of Delaware, accepted and assumed the obligations imposed by its laws. It pertinently commented that the assertion that the Iowa law governed the rights of the parties, because the debtor subsequently migrated and resided there for the period of its limitation laws, constituted its own repudiation.

Lamb resided in Colorado before and after the rights and obligations of the parties were adjudicated by the original 1927 Colorado judgment. The Colorado Act of 1935, which reduced the judgment interest rate from 8% to 6% per annum was a benefit to him and a detriment to Appellant, *but it still governed their respective rights*. The obligations binding upon Respondent under Colorado law which he voluntarily accepted as a resident, were not cast off at its borders when he migrated to Missouri. The revivor judgment bound him anew in Colorado. It was equally binding and was entitled to be enforced in Missouri, at any time before the Missouri 10 year limitation period intervened.

That just principle is the true basis of enforcing private rights and obligations which originate elsewhere, rather than comity or courtesy between sovereigns which have no real interest to be subserved in such matters (Cf.

Beale, *The Conflict of Laws*, (1935) pp. 1371, 1372, 1413, 1416, Secs. 430.1, 446.1 and 449.1; *Freeman on Judgments*, Vol. 3, Section 1494; *Annotation*, 148 A. L. R. 991, and case, p. 984.

The importance attached to that principle is evident from the constitutional command of Article IV, Section 1, which the States must obey and by its prior counterparts in the Resolution of the Continental Congress in 1777 and in the Articles of Confederation (March 1, 1781) and by the Act of May 26, 1790, enacted by the first Congress under the Constitution to implement *Article IV, Section 1*.

Experience from the days of the Revolution and under the Confederation demonstrated that comity was a mere rope of sand which did not secure enforcement of obligations incurred elsewhere, against citizens who were at liberty to migrate from State to State and into the opening Northwest Territories, without prior leave of the sovereign to depart the Realm of other formalities. Denying recovery on obligations incurred and valid in other states as was only too often done, resulted in restricted credit and fermented disunity, discontent, general economic uncertainty and reflected upon the integrity of the courts.

Law reviews have often remarked the uniformity of the decisions of this Court from its beginning, in requiring full faith and credit (and nothing less) to be accorded to money judgments lawfully rendered between private litigants under the laws of sister states, subject only to reasonable limitation laws of the forum and to inquiry into the jurisdiction of courts under the laws of the state of rendition, as the sole recognized exceptions.

The opinion below erred in assuming that a valid second defense was "that the service upon defendant for revival of the Colorado judgment was not personal service within the meaning of that term in Section 1038" (R. 23).

Whether such service conformed with or was contrary to Missouri law is not material. Colorado law governed and full faith and credit was required to be given thereto (Subdivision C herein).

B:

The Missouri courts contravened U. S. Constitution, Article IV, Section 1, and Amendment XIV, Section 1, and 28 U. S. C. 687, now Section 1738, by extraterritorially extending its statutes to readjudicate thereunder the underlying cause of action which was res judicata and merged in the Colorado judgment of revivor. Full faith and credit and the same effect which the judgment of revivor had under Colorado law was erroneously denied thereto and requires reversal here.

Section 1038, R. S. Mo., 1939, as applied in the opinion below, is clearly delineated by slightly paraphrasing the language of *Christmas v. Russell*, 5 Wall. 290, 301, 302, 18 L. Ed. 475, 478, 479, as follows:

"Instead of being a statute of limitations in any sense known to the law," Section 1038 as construed, "in legal effect, is but an attempt to give operation to the statute of limitations of that state in all other states of the Union, by denying the efficacy of any judgment recovered in another state against a citizen of" Missouri "for any cause of action which was barred in her tribunals under that law. Where the cause of action that led to the judgment was not barred by her statute of limitations the judgment may be enforced; but if it would have been barred in her tribunals, under her statute, then the prohibition is absolute that no action shall be maintained on the judgment."

"* * * Where the jurisdiction has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits." * * * "If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere" in the courts of the United States. 2 Story, Const., 3rd Ed., Sec. 1313.

5. Applying these rules to the present case, it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals." * * * "It is not competent for any other state to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken" (Italics ours).

The Mississippi statute there held void provided that no action should be maintained on any judgment rendered by any court without that state against a resident, if the cause of action would have been barred by any act of limitation, if such suit had been brought in Mississippi.

Keyser v. Lowell, (C. C. A. Colo., 1902) 117 Fed. 400, ruled that a Colorado statute which barred actions on judgments rendered in other states, if the underlying causes of action were barred under its statute, was not a statute of limitations but was a statute of nullification or prohibition which denied full faith and credit and was unconstitutional and void.

That Missouri was without power to give extraterritorial effect to its laws and was required to give the Colorado judgment of revivor the same force and effect which it had in that State, is established by *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149, and *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 1296.

Roche v. McDonald, 275 U. S. 449, 72 L. Ed. 365, 48 S. Ct. 142, ruled upon a Washington statute which provided that a judgment should cease to be a charge and that no suit should be had to extend its duration or to continue it in force beyond six years: Roche sued in Oregon on a

Washington judgment. Judgment against McDonald was rendered thereon in Oregon more than six years after the date of the original Washington judgment. Roche thereafter sued to enforce the Oregon judgment in Washington. The Washington courts sustained McDonald's defense that the Washington statute prohibited recovery because the Oregon judgment was rendered more than six years after the date of the original judgment in Washington. The Washington courts concluded (as in effect does the opinion below), that the judgment of a sister state should be viewed "*in the light of the foundation upon which it rests and the judgment law of our own state.*"

In reversing the Washington courts, Mr. Justice Sandford said:

"It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution required that the judgment of a state court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that *only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state*" (Citing cases). "This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, **MUST BE ENFORCED IN SUCH OTHER STATE, ALTHOUGH REPUGNANT TO ITS OWN STATUTES**" (Citing cases; emphasis ours).

In *Fauntleroy v. Lum*, 210 U. S. 231, 236, 52 L. Ed. 1039, 1041, 28 S. Ct. 641, suit on a Missouri judgment was filed in Mississippi. The Missouri judgment was rendered on a

contract made in Mississippi to gamble in cotton futures. A Mississippi statute made the contract a misdemeanor and provided that such contracts "*should not be enforced by any court.*" In reversing the Mississippi courts for refusing to accord full faith and credit to the Missouri judgment, the court said: .

"The doctrine laid down by Chief Justice Marshall was that the judgment of a state court should have the same credit, validity and effect in every other Court in the United States, which it had in the state where it was pronounced and that whatever pleas would be good to a suit thereon in such state and none others, could be pleaded in any other court of the United States."

In *Kenny v. Supreme Lodge L. O. M.*, 252 U. S. 411, 415, 64 L. Ed. 638, 40 S. Ct. 371, suit on an Alabama judgment was filed in Illinois. The Alabama judgment was on a cause of action which could not be brought or prosecuted under an Illinois statute. The Illinois statute was held to be unconstitutional and void because it was repugnant to the full faith and credit clause.

Allegheny County v. Maryland Casualty Co., 132 F. 2d 894 (C. C. A. 3), 897, held, Sub. 5-8:

"But it must be remembered that a judgment is the sentence of the law given by the court as the result of proceedings instituted therein for the redress of an injury. If it is a final judgment it terminates the controversy and either merges into itself or bars the plaintiff's claim. *It thus itself becomes the generating source of new rights and liabilities of the parties. Under the constitution it is entitled to full faith and credit in every American jurisdiction*" (Emphasis ours).

Deposit Bank v. Board of Councilmen of Frankfort,
 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276, 1. c. 280, 281,
 ruled:

"The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based, if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

Local laws, policies, states' rights or preference for its own laws are not in issue in a suit on a judgment of a sister state. Enforcement of the same rights and liabilities which governed the parties under the laws of the state in which the judgment was rendered is just and should have been granted by comity (15 C. J. S. 836). The duty was mandatory under the full faith and credit clause.

50 C. J. S. 480, 481, 482, Sec. 889 (D) (E), epitomizes the rulings of the numerous cases cited. The text states:

"(d) There may be exceptional cases where the full faith and credit clause does not require that recognition be given a judgment of a sister state which is in violation of the laws and policy of the forum, and the Supreme Court of the United States is the final arbiter of such cases.

"There are no exceptions in the case of a money judgment rendered in a civil suit, the policy or law of the forum in which it is sought to enforce such a judgment cannot impair the force and effect which the full faith and credit clause of the federal Constitution and the Act of Congress require to be given to such a judgment outside the state of its rendition:

* * * *It compels enforcement of a judgment, even though a suit on the original cause of action, if brought in the forum before judgment was obtained, would have been barred by limitations. A judgment must be recognized, even though the statute on which the judgment is based need not be applied because it is in conflict with the law and policy of the forum.*"

"(e) In accordance with the general rule, considered *supra* subdivision (b) of this section, that a judgment is entitled to the same faith and credit as is accorded it in the state where rendered, a judgment is not subject to collateral attack in another state if not subject to such attack in the state where rendered."

The judgment of revival was conclusive as to all of the *media concludendi*, and was not subject to impeachment, whether right or wrong. It was not open for re-examination by the Missouri courts. *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 488; *Milwaukee County v. White*, 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. (Sub. 15) 228; *Titus v. Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653, 657, Sub. 2; *Adam v. Saenger*, 303 U. S. 59,

58 S. Ct. 454, 82 L. Ed. 649; *American Express Co. v. Mullins*, 212 U. S. 311, 29 S. Ct. 381, 53 L. Ed. 525; *Broderrick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100; *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 29.

C.

The judgment of revivor was a continuation of the original action. Service of the notice and motion to revive upon defendant in Missouri was valid under Colorado law. The procedure met the requirements of due process of law and was binding upon the Missouri Courts under the Full Faith and Credit Clause.

The original judgment in 1927 was on personal service upon defendant in Colorado. The motion to revive and notice, followed by the judgment of revivor, was a continuation of the original action and not a new action.

The notice essential to due process of law is the original notice whereby the court acquired jurisdiction of the person and not notice of the time when jurisdiction which is already acquired will be exercised.

The Lessee of Walden v. Craig's Heirs, 14 Pet. 147, 10 L. Ed. 393.

The U. S. v. Ritchie, 17 How. 525, 15 L. Ed. 236.

McKnight v. Craig's Adm., 6 Cranch 183, 187, 3 L. Ed. 193.

Plimpton v. Mattakeunt, 6 Fed. Supp. 72, 77.

In *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867, 874, Mr. Justice Holmes said:

Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining

the physical power and attribute the same force to the judgment or decree, whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. It applies to Article IV, Section 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause. *Nations v. Johnson*, 24 How. 195, 203, 204, 16 L. Ed. 628, 631, 632. This is true not only of ordinary actions but of proceedings like the present" (Emphasis ours).

International Shoe Co. v. Washington, 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 102, ruled:

"But now that *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Barber v. Barber, 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 82, required the courts of Tennessee to accord full faith and credit to a North Carolina judgment for alimony. The amount due was determined by the North Carolina court after notice to the defendant who was outside of the jurisdiction, but upon whom personal service was had in the divorce action. *Cukor v. Cukor*, (Vt.) 168 A. L. R. 227, 49 Atl. 2d 206; *Durlacher v. Durlacher*, (C. C. A. Nev.) 123 F. 2d 70-72, and *Durlacher v. Durlacher*, 17 N. Y. S. 2d 643, 647, 173 Misc. 329, hold that full faith and credit must be accorded to judgments for alimony, where judgments for the arrears were entered by the New York Courts after service of notice by registered mail to defendants who were out-

side of New York but who were personally served in the original divorce actions.

The Colorado judgment of revivor is clearly distinguished from the new judgment rendered in an action for debt under the Pennsylvania law, with which the court had to deal in *Owens v. McCloskey, Exr. of Henry*, 161 U. S. 642, 16 S. Ct. 693, 40 L. Ed. 837. The Court there held that the Pennsylvania judgment rendered for "want of appearance on two returns of nihil," without actual notice to the defendant, did not remove the statutory bar of limitation in Louisiana, because the judgment rendered in Pennsylvania according to its laws was an entirely new judgment for the principal, interest and costs due on the original. Cf. *Brown v. Wygant*, 163 U. S. 618, 16 S. Ct. 1159, 41 L. Ed. 284, and *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278.

Constructive service upon a non-resident to revive a judgment was held valid in *Bank of Edwardsville v. Raffaele*, 381 Ill. 486, 45 N. E. 2d 651, 144 A. L. R. 401. An extensive *Annotation* follows that case in 144 A. L. R. 403.

CONCLUSION.

The application by the Missouri courts of Section 1038, R. S. Mo., 1939, manifestly contravened 28 U. S. C. 687, now 1738, and the provisions of the federal Constitution mentioned, which Appellant urged and relied upon throughout. The judgment indisputably denied Appellant the federal rights secured thereby and requires reversal.

Respectfully submitted,

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JOHN G. KILLIGER, JR.,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 500

THE UNION NATIONAL BANK OF WICHITA,
KANSAS,

Appellant,

vs.

CARL C. LAMB

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OPPOSING JURISDICTION

DANIEL L. BRENNER,
Counsel for Appellee.

ROACH, BRENNER & WIMMEL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 500

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, A CORPORATION,

Appellant,

v.s.

CARL C. LAMB

Appellee.

**STATEMENT IN OPPOSITION TO APPELLANT'S
JURISDICTIONAL STATEMENT**

Comes now Carl C. Lamb, appellee herein, and in opposition to appellant's jurisdictional statement, states and shows to the Court:

I

**No Substantial Federal Question Is Presented by This
Appeal**

This appeal presents no substantial Federal question, and therefore should be dismissed. The question involved in this case is simple and clear cut. Appellant obtained judgment against the appellee on December 8, 1927, at Denver, Colorado, in the District Court for the Second Judicial District of Colorado. This judgment was revived on October 27, 1945, more than seventeen years after its original

rendition. Substituted personal service in the revival proceedings was had on appellee by registered mail and by delivery by a deputy sheriff of Jackson County, Missouri, at Kansas City. The present action on this Colorado judgment, as revived, was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City. Appellee defended this suit upon the ground that the action was barred by the applicable Missouri statute of limitations, Section 1038, Missouri Revised Statutes, 1939. Judgment of the trial court was for appellee, and the judgment was affirmed by the Supreme Court of Missouri, Division One, by opinion. 213 S.W. (2d) 416. Appellant contends that the application of this statute of limitations and consequent denial of recovery constitutes a failure to give full faith and credit to the Colorado judgment as is required by Article IV, Section 1, of the Constitution of the United States.

The Missouri Statute, section 1038, *supra*, has been held to be a statute of limitations by the Missouri Supreme Court in the case of *Northwestern Brewers Supply Co. v. Vorhees*, — Mo. —, 203 S.W. (2d) 422, and as such was applied to the case at bar by the Missouri Supreme Court, which held that this statute, providing that suits on judgments, either domestic or foreign, are barred after ten years from the date of their original rendition, unless revived on personal service within such ten year period, barred the present action on the Colorado judgment. This holding is in complete accord with the decision of the Supreme Court of the United States in such cases as *McElmoyle v. Cohen*, 38 U. S. 312, 10 L. Ed. 177, and *Bacon v. Howard*, 61 U. S. 22, 15 L. Ed. 811. Both of these cases have been repeatedly cited from the date of their decision down to the present time; such citation has always been with approval and the

cases have been held to be controlling. In the *McElmoyle* case, *supra*, the Court said:

“ . . . But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the Statute of Limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred:”

Upon this basis has been built the well established rule of law that the state of the forum will apply its own statute of limitations to suits upon foreign judgments, and that such action does not contravene the full faith and credit clause of the Constitution of the United States (Article IV, Sec. 1). See 34 C. J. 1110, Judgments, Sections 1577 and 1578, 52 A.L.R. 567, and 31 Am. Jur. 346, Judgments, Sections 848, where this general rule is stated thus:

“As to the operation of the full faith and credit provision, it has uniformly been held that each of the States of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another State, without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States
”

Since the decision of the Missouri Supreme Court in the case at bar follows and is in accord with the generally ac-

cepted doctrine on the subject and with the controlling decisions of the Supreme Court of the United States, it is submitted that the appeal herein presents no substantial Federal question, and should therefore be dismissed.

II

Appeal Is Not the Proper Method of Securing Review Herein

This Court has held in *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed. 365, and *Morris v. Jones*, 329 U. S. 545, 91 L. Ed. 488, that the question of whether or not full faith and credit has been given to a foreign judgment does not present a ground for appeal, and that cases involving such questions can only be reviewed by this Court on writ of certiorari. This decision was reached under Section 237 of the Judicial Code (28 U.S.C.A. Sec. 344). The same provisions now appear, without material change, in Sections 1257 and 2103 of Title 28 U.S.C.A. as revised and effective September 1, 1948. Thus the decision of the two cases just cited should be controlling herein, even though we are now dealing with the provisions of the revised Code.

From a consideration of these cases, it is apparent that appellant has attempted to secure review herein by an unauthorized method, and for this reason the appeal herein should be dismissed.

Under the provisions of Section 2103, Title 28, U.S.C.A. as revised and effective September 1, 1948, the papers herein may be considered as a petition for writ of certiorari, but this does not help appellant. As is stated in paragraph 5 of Rule 38 of this Court, review on certiorari is not a matter of right, but of sound judicial discretion. The decision of the Supreme Court of Missouri in the case at bar is in complete accord with and follows the controlling decisions of this Court, as has been pointed out under point

Number One herein above. There is no conflict between this decision of the Missouri Supreme Court and the controlling decisions of this Court nor is there conflict between the decision of the Missouri Supreme Court in the case at bar and the decisions of other State Supreme Courts or of the lower Federal Courts. Under these circumstances, it is submitted that the case at bar does not present a proper occasion for this Court to exercise its discretion and grant the writ of certiorari.

Thus it is seen that the decision of the Supreme Court of Missouri in the case at bar is in accord with the controlling decisions of this Court, and therefore this appeal presents no substantial Federal question, and the case is not one wherein the Court should exercise its discretion to grant certiorari. It is, therefore, respectfully submitted that this appeal should be dismissed and, treating the appeal as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.

**Supreme Court of the
United States**

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF IN BEHALF OF APPELLEE.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA,
KANSAS, A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF IN BEHALF OF APPELLEE.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri, Division No. 1, Union National Bank of Wichita, Kansas, vs. Lamb, No. 40684, is reported in 213 S. W. 2d 416, and appears in full in the record (R. 19-23). The case has not as yet been reported in the official Missouri Supreme Court Reporter.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Appellee opposes the jurisdiction of this Court for the reasons and on the grounds set forth under point I of his brief and argument, *infra*.

STATEMENT OF THE CASE.

On December 8, 1927, the appellant recovered a judgment against appellee at Denver, Colorado, in the District Court for the Second Judicial District of Colorado (R. 3).

On October 27, 1945, seventeen years eleven months and eleven days later, the Colorado judgment was revived (R. 4).

The revival was upon notice mailed to the appellee in Kansas City, Missouri, and also delivered to appellee in Kansas City, Missouri, by a deputy sheriff of Jackson County, Missouri (R. 10, 12).

It is not contended that there had at any time been a payment entered of record upon the Colorado judgment.

This action upon the revived judgment was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City (R. 1).

Appellee contends that the Colorado judgment was and is barred by Section 1038, Missouri Revised Statutes, 1939, as was held by the Missouri Supreme Court, 213 S. W. 2d 416 (R. 19-23), and that this decision denying recovery on the Colorado judgment did not deny full faith and credit to such judgment, and did not contravene Article IV, Section 1, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

The appeal herein was applied for on December 13, 1948, which was the ninety-first day after appellant's motion for rehearing or transfer to the Court *en banc* was denied. The rules of this Court require that the appeal be applied for within the time allowed by statute (Rule 36) and the statute allows ninety days (Title 28, United States Code, Section 2101(c)). The last day of this ninety day period fell on Sunday. The Circuit Courts of Appeals have uniformly held that an appeal taken on the Monday following the last day limited by statute for appeal which falls on Sunday, is not timely. No controlling opinion of this Court has been found. It is, therefore, submitted that the appeal herein was not timely.

• The decision of the Supreme Court of Missouri is in accord with the controlling decisions of this Court in applying its own statute of limitations to a suit on a foreign judgment. Therefore, this appeal presents no substantial Federal question and should not be allowed. Appellant has sought review herein by appeal, when, under the decisions of this Court, the proper remedy is by petition for writ of certiorari. Treating the appeal as an application for certiorari, as is authorized by statute, this is not a case where this Court should exercise its discretion and grant the writ, because of the lack of any substantial Federal question. Also, appellant is in serious default as to the service and filing of its brief. Therefore, it is submitted that the Court is without jurisdiction and should not consider the appeal herein on its merits.

The case at bar is a suit in Missouri on a judgment rendered against appellee in Colorado in 1927. This judgment was revived in Colorado in 1945 by service had on appellee in Missouri. The Supreme Court of Missouri ap-

plied the Missouri statute of limitations to this case and held that the action was barred. In so doing, the Missouri Supreme Court followed the generally accepted rule on the subject that the state of the forum may apply its own statute of limitations to a suit on a foreign judgment. This rule is based on early decisions of this Court which so held, and these decisions have been repeatedly cited and followed as controlling, down to the present time. This action of the Missouri Supreme Court did not contravene the full faith and credit clause of Article IV, Section 1, of the Constitution of the United States. It is, therefore, submitted that, if this appeal is considered on its merits, the decision of the Supreme Court of Missouri herein should be affirmed.

ARGUMENT.

I.

This Court Is Without Jurisdiction to Consider the Appeal Herein on Its Merits.

A.

The Appeal Herein Was Not Timely.

The opinion of the Supreme Court of Missouri in this case was handed down July 12, 1948 (R. 19). Appellant filed its motion for rehearing or for transfer to the Court in Banc within proper time (R. 23) and such motion was overruled on September 13, 1948 (R. 34). The appeal papers were filed with the Missouri Supreme Court and the appeal allowed on December 13, 1948 (R. 34-39).

Section 2101(c), Title 28, United States Code, provides;

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days* after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days" (Emphasis added).

Before the recent revision of Title 28, U. S. C., the period was three months. The change to ninety days was made because it was considered by the revisers to be more specific. See Title 28, United States Code Congressional Service, Reviser's Notes, page 1899, published 1948 by West Publishing Company and Edward Thompson Company.

This statute requires that this appeal be taken or applied for within ninety days. Thus, the question of timeliness of the appeal turns on whether or not December 13, 1948, the day on which this appeal was taken, was within the ninety days allowed by statute for the appeal.

Although the opinion of the Missouri Supreme Court was handed down on July 12, 1948, the time for appeal did not begin to run until September 13, 1948, the date on which appellant's motion for rehearing or transfer to the Court *en banc* was denied. Excluding September 13, 1948, as must be done, see *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, 248 Fed. 226; 3 Am. Jur. 143, Appeal and Error; Section 423, the last day of the ninety days allowed by the above statute for this appeal was December 12, 1948, which was a Sunday. Thus, the appeal herein, which was taken on Monday, December 13, was taken on the 91st day and was not within the time allowed by statute for such appeal.

Appellant contends that the last or 90th day being a Sunday, such day should be excluded from the time limited by statute within which an appeal is allowed, and the appeal which was taken on Monday, the 91st day, should be held timely. The authorities do not support this contention. No decision of this Court has been found which is in point on this question but it is axiomatic that this Court will examine its own jurisdiction even where the question is not raised by the parties. *Oneida Navigation Corporation v. W. & S. Job & Co.*, 252 U. S. 521, 64 L. Ed. 697; *Stearns Oil & Gas Co. v. Dittman*, 245 U. S. 210, 61 L. Ed. 248, and that jurisdiction cannot be conferred by waiver or consent of the parties but must appear from the provisions of law granting such jurisdiction. See *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462; *Great Southern Fire Proof Hotel v. Jones*, 177

U. S. 449, 44 L. Ed. 842. However, numerous decisions of various Circuit Courts of Appeals have been found which construe the timeliness of appeals taken on Monday where the last day of the time for appeal as limited by statute fell on Sunday. These cases uniformly hold that such appeals are not timely and do not support the jurisdiction of the appellate court.

The earliest case found which involves this point is the leading case of *Johnson v. Meyers*, (1893) 54 Fed. 417, wherein the last day of the period of six months allowed by statute for an appeal fell on Sunday and the appeal was taken on the following Monday. The Court held that this appeal was not in time and it was therefore dismissed. The Court noted that there would of necessity be many Sundays included in the time for appeal and that there was no authority for excluding the first, the last, or any or all intermediate Sundays. After pointing out that Congress had, in other statutes, provided for the exclusion of all Sundays or allowed action on Monday when the last day of the time limit fell on Sunday, Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, said:

"These provisions clearly indicate that it was the understanding and intention of congress that all Sundays should be counted as part of the time limited within which an act is to be done under their legislation, unless they are excluded by express provision. Where the time limited for the performance of an act is less than seven days, where the unit of its measurement is the day, and there is reason to suppose that juridical days were intended by a statute or act of congress, there is reasonable ground for the holding that Sundays and legal holidays falling within such time should be excluded. *Hales v. Owen*, 2 Salk. 625; *Rex v. Elkins*, 4 Burrows 2130; *Thayer v. Felt*, 4 Pick. 354. But where the time limited is such that

one or more Sundays must fall within it, and there is no statute or act excluding any of them, it is certainly not the province of the court to extend the time fixed by excluding the last, the first, or any intermediate Sunday or holiday."

In *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, the last day of the six months' period allowed by statute for taking appeals fell on Sunday and the appeal was not taken until the following Monday. Judge Gilbert, speaking for the Circuit Court of Appeals, Ninth Circuit, said:

"At common law, when Sunday is the last day of the time within which an act is to be performed under a contract, it is excluded, and performance on Monday is allowed. *Hammond v. American Mutual Life Ins. Co.*, 10 Gray (Mass.) 306; *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; *Pressed Steel Car Co. v. Eastern R. Co.*, 121 Fed. 609, 57 C. C. A. 635. So, in construing rules of court in respect to time for pleading and other matters of mere practice, if the last day fall on Sunday, the whole of the next day is allowed within which to perform the required act. *Anonymous*, 2 Hill (N. Y.) 375, and cases there cited. But while courts may construe their own rules equitably and extend the time therein limited, they have no such power as to statutes, and the decided weight of authority is that when the act is to be done within a time fixed by statute, and the last day thereof falls on Sunday, that day will not be excluded, unless a different rule for computing the time is also provided by statute. *Alderman v. Phelps*, 15 Mass. 225; *Ex parte Dodge*, 7 Cow. (N. Y.) 147; *Drake v. Andrews et al.*, 2 Mich. 204; *Pearpoint and Lord v. Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10877; *Shefer et al. v. Magone*, (C. C.) 47 Fed. 872; *Johnson et al. Meyers et al.*, 54 Fed. 417, 4 C. C. A. 399; *Hermann v. United States*, (C. C.) 66 Fed. 721. While the codes and statutes of most of the states provide for the exclusion of Sunday when it is the last day within which an appeal may be taken or

other act performed under statutory authority, Congress has made no such provision in reference to appeals from any of the federal courts. The fact that it has made such provision specially as to certain other proceedings is to be taken as indicative of its intention to limit the same to those proceedings.

These decisions are in accord with the general rule for computing periods of time limited by statute, unless a different method of computation is expressly provided by the statute. See 3 Am. Jur. 143, Appeal and Error, Section 423, where this general rule is expressed thus:

"As is true in the computation of time generally, in computing the time within which an appeal or error proceeding must be taken, the day on which the judgment or decree was rendered should be excluded, and the last day of the specified period should be included.

"The view has been taken that in determining whether Sunday should be excluded or included in computing time for an appeal, if the time limited exceeds a week, Sunday is included in the computation. For instance, when the last day falls on Sunday, it cannot be excluded and the proceedings taken on the following Monday unless there is some provision showing that it was the intention of the legislature that such day should be excluded. But if the time specified is less than a week, Sunday is excluded."

The above cited cases have been cited and followed as controlling in all of the cases found involving the taking of an appeal on Monday when the last day of the time limited by statute falls on Sunday. See *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, (C. C. A. 2) 248 Fed. 226; *Northwestern Public Service Co. v. Pfeifer*, (C. C. A. 8) 36 F. 2d 5; *Larkin Packer Co. v. Hinderliter Tool Co.*, (C. C. A. 10) 60 F. 2d 491; *Walters v. Baltimore & O. R. Co.*, (C. C. A. 3) 76 F. 2d 599; *Walker v. Hazin*, (U. S. C. A. D. C.) 90 F. 2d 502, cer-

tiorari denied, 302 U. S. 723, 82 L. Ed. 559; *Frackelton v. United States*, 57 Ct. Cl. 587.

This same rule is applied to situations other than matters of appeal where the time within which an act must be done is limited by statute, the last day of such period falls on Sunday and the party attempts to do the act on the following Monday. See *Marisca v. United States*, (C. C. A. 2) 277 Fed. 727, certiorari denied 257 U. S. 657, 66 L. Ed. 420; *U. S. ex rel. Lutz v. Ragan*, (C. A. 7) 171 F. 2d 788; *In re Yarnoff*, (D. C. N. D. Ill. E. D.) 18 Fed. Supp. 587; *Graf v. United States*, (Ct. Cl.) 24 Fed. Supp. 54; *Ferd. Mulhens, Inc., v. Heggins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42; *Wyker v. Willingham*, (D. C. N. D. Alabama, S. D.) 55 Fed. Supp. 105; *Yuri Yojima v. United States*, (D. C. E. D. N. Y.) 6 F. R. D. 260.

Thus, it is seen that the general rule is that where a statute limits the time within which action can be taken and the last day of such period falls on Sunday, action on the following Monday is not timely. As shown by the cases cited above, this general rule has been accepted and followed as controlling by the Circuit Courts of Appeals for the Second, Third, Seventh, Eighth, Ninth and Tenth Circuits, and the District of Columbia; also by the Court of Claims and the District Courts for the Northern District of Illinois, the Northern District of Alabama, and the Eastern and Southern Districts of New York. No case has been found holding an appeal to be timely when taken on the Monday which follows the last day of the statutory time for appeal which falls on Sunday.

The Federal Rules of Civil Procedure, Rule 6(a), provide that in the computation of time under these rules, where the last day for performance falls on Sunday or a holiday, performance on the next day which is not a holi-

day or Sunday is timely. This method of computation can only be as broad as the rules which prescribe it, and it is clear that these rules do not govern an appeal from the Supreme Court of Missouri to the United States Supreme Court. Such appeal is covered by the rules of this Court. Rule 36, paragraph 1, expressly provides:

"An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the Judge or Justice who allows it."

As has been pointed out above, the period fixed by statute for this appeal is ninety days; Title 28, United States Code, Section 2101(c). The Rules of this Court make no provision for the taking of an appeal on the following Monday when the last day of the period fixed by statute falls on Sunday. Likewise, there is no such provision in the statute.

As has previously been mentioned, Title 28 has recently been revised, and in such revision the period for appeal fixed by statute was changed from three months to ninety days. This change was made because the ninety day period was considered to be more definite. At the time this change was made the long and unbroken line of decisions discussed above to the effect that the courts could not increase the period fixed by statute for appeal where the last day of such period fell on Sunday by allowing such appeal to be taken on the Monday following, was in existence and it cannot be presumed that either the revisers or Congress was ignorant of such rule. Thus, when this change was made in the interest of definiteness, the change must have been made with this long established rule in mind. When this period of ninety days for appeal is considered together with the above rule and the rule of excluding the first day and including the last, the period

fixed by statute is seen to be as definite as it is possible to establish.

The only case found which does not approve and follow the above rule is *Sherwood Bros., Inc., v. District of Columbia*, (U. S. C. A. D. C.) 113 F. 2d 162, where the statute allowed ninety days within which to file claim for refund with the District of Columbia Board of Tax Appeals. The last day of this period fell on Sunday. On the preceding Friday the claimant learned that its attorney had not filed the claim and was then on vacation. The claimant prepared its own claim and mailed it from Baltimore on Saturday, the eighty-ninth day. In the normal course of things the letter would have been delivered in Washington the following or ninetieth day. However, that day was Sunday and the letter was delivered and the claim filed with the Board on Monday, the ninety-first day. The court held that the filing of this claim was timely. In reaching this conclusion the court mentioned the cases following the general rule as to time for appeal, especially *Walker v. Hazin*, 90 F. 2d 502, *supra*, indicated dissatisfaction with the rule, but held that such cases were not controlling. The court pointed out that a matter of administrative procedure was involved, and held that the rules applying to such procedure should not be construed with great strictness against the claimant and the claim was held to be timely. While the opinion raised some question as to desirability of the rule as to time for appeal, the court did not commit itself on the matter, it did not overrule its previous decision in *Walker v. Hazin*, *supra*, and decided that such cases were not controlling. One judge dissented on the ground that the general rule as set out in *Walker v. Hazin* was controlling and therefore the claim was filed late.

In addition to the *Sherwood* case, *supra*, appellant has cited and relied on *Street v. United States*, 133 U. S. 299.

33 L. Ed. 631, wherein this Court construed an act of Congress authorizing the President of the United States, for the purpose of reducing the army after the Civil War, to transfer officers from active duty to the list of supernumeraries and to fill vacancies on the active list with supernumerary officers, on or before January 1. The order under this statute was issued January 2, the first having been a Sunday. This Court stated in its opinion that since the President had power to issue the order up to and including the first and since the first fell on Sunday, the statute would not be construed narrowly and the order of the second would be considered within the power of the President, since Sunday was a *dies non* and the order, to have maximum effect, had to be issued as late as possible.

It should be noted that the question of timeliness was not decisive of the case since the Court found that there were several other grounds on which the validity of the order was sustained, including later ratification by Congress. The Court held that the plaintiff could not recover his army pay for sixteen years during which he was not in service.

This case has been several times advanced as sustaining an appeal taken on Monday when the last day fixed by statute fell on Sunday but it has never been held to be controlling. See *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, (C. C. A. 2), 248 Fed. 226; *Walker v. Hazen*, (U. S. C. A. D. C.) 90 F. 2d 502; *In re Yornoff*, (D. C. N. D. Ill. E. D.) 18 Fed. Supp. 587; *Ferd. Mulhens, Inc., v. Higgins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42.

Appellant has also cited and relied on *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72, which involved the construction of a Texas statute concerning the sale of public lands. This statute provided that when an offer to buy certain land was recorded with the surveyor the pur-

chaser had ninety days within which to make certain payments, etc., and that during such ninety days the land was withdrawn from the market and the surveyor could not accept another offer for that land. In this case the ninety days from a previous offer expired on Sunday and the offer here considered was recorded with the surveyor on the previous Saturday, the 89th day. This Court held that the offer recorded on Saturday was of no effect since it was made within the ninety day period during which the land was withdrawn from the market and the fact that the last day was Sunday made no difference. These facts present the exact converse of the situation under consideration in the case at bar. This case has also been considered by the courts in connection with the timeliness of an appeal and held not to be controlling: *Siegelschiffer v. Penn. Mut. Life Ins. Co.*, (C. C. A. 2) 248 Fed. 226; *Ferd. Mulhens, Inc., v. Higgins*, (D. C. S. D. N. Y.) 55 Fed. Supp. 42.

In *Wilson v. Southern Ry. Co.*, (C. C. A. 5) 147 F. 2d 165, cited by appellant, the court held that the timeliness of the appeal to the Circuit Court of Appeals was governed by the Federal Rules of Civil Procedure, Rule 6(a). However, the Court pointed out that in the absence of the Federal Rules, which controlled this particular appeal, "the courts with unanimity held that, where the three-month period expired on Sunday, the litigant must take his appeal on or before the preceding Saturday."

Thus, it appears that there is no reason or authority which either requires or indicates the desirability of deviation from the repeatedly enunciated rule that the courts will not extend the time allowed by statute for appeal to include the following Monday when the last day of the period falls on Sunday.

Supreme Court Rule 36 provides that the appeal is out of time unless the application is presented within the period

fixed by statute. This period is 90 days and the application in the case at bar was not presented to the judge who allowed the appeal until the 91st day. Therefore, it is submitted that this appeal is not timely; that the courts have universally held that the time cannot be extended to include the following Monday, and the appeal should be dismissed.

B.

No Substantial Federal Question Is Presented by This Appeal.

This appeal presents no substantial Federal question, and therefore should be dismissed. The question involved in this case is simple and clear cut. Appellant obtained judgment against the appellee on December 8, 1927, at Denver, Colorado, in the District Court for the Second Judicial District of Colorado. This judgment was revived on October 27, 1945, more than seventeen years after its original rendition. Substituted personal service in the Colorado revival proceedings was had upon appellee by registered mail and by delivery by a deputy sheriff of Jackson County, Missouri, at Kansas City, Missouri. The present action on this Colorado judgment, as revived, was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City. Appellee defended this suit upon the ground that the action was barred by the applicable Missouri statute of limitations, Section 1038, Missouri Revised Statutes, 1939. Judgment of the trial court was for appellee, and the judgment was affirmed by the Supreme Court of Missouri, Division One, by opinion reported at Mo. , 213 S. W. 2d 416. Appellant contends that the application of this statute of limitations and consequent denial of recovery constitutes a failure to give full faith and credit to the Colorado judgment as is required by Article IV, Section 1, of the Constitution of the United States.

The Missouri Statute, Section 1038, *supra*, has been held to be a statute of limitations by the Missouri Courts, *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S. W. 2d 422; and *Crane v. Reinking*, Mo. App. , 215 S. W. 2d 759, and as such was applied to the case at bar by the Missouri Supreme Court, which held that this statute, providing that suits on judgments, either domestic or foreign, are barred after ten years from the date of their original rendition, unless revived on personal service within such ten year period, barred the present action on the Colorado judgment. This holding is in complete accord with the decisions of the Supreme Court of the United States in such cases as *McElmoyle v. Cohen*, 38 U. S. 312, 10 L. Ed. 177; and *Bacon v. Howard*, 61 U. S. 22, 15 L. Ed. 811. Both of these cases have been repeatedly cited from the date of their decision down to the present time; such citation has always been with approval and the cases have been held to be controlling. In the *McElmoyle* case, *supra*, the Court said:

* * * But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the Statute of Limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred."

Upon this basis has been built the well established rule of law that the state of the forum will apply its own

statute of limitations to suits upon foreign judgments, and that such action does not contravene the full faith and credit clause of the Constitution of the United States (Article IV, Sec. 1). See 34 C. J. 1110, Judgments, Secs. 1577 and 1578, 52 A. L. R. 567, and 31 Am. Jur. 346, Judgments, Sec. 848, where this general rule is stated thus:

"As to the operation of the full faith and credit provision, it has uniformly been held that each of the States of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another state, without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States * * *"

Since the decision of the Missouri Supreme Court in the case at bar follows and is in accord with the generally accepted doctrine on the subject and with the controlling decisions of the Supreme Court of the United States, it is submitted that the appeal herein presents no substantial Federal question, and should therefore be dismissed.

C.

Appeal Is Not the Proper Method of Securing Review Herein.

This Court has held in *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed. 365, and *Morris v. Jones*, 329 U. S. 545, 91 L. Ed. 488, that the question of whether or not full faith and credit has been given to foreign judgment does not present a ground for appeal, and that cases involving such questions can only be reviewed by this Court on writ of certiorari. This decision was reached under Section 327 of the Judicial Code (28 U. S. C. A., Sec. 344). The same provisions now appear, without material change, in Sections 1257 and 2103 of Title 28, U. S. C. A. as revised and

effective September 1, 1948. Thus the decision of the two cases just cited should be controlling herein, even though we are now dealing with the provisions of the revised Code.

From a consideration of these cases, it is apparent that appellant has attempted to secure review herein by an unauthorized method, and for this reason the appeal herein should be dismissed.

Under the provisions of Section 2103, Title 28, U. S. C. A., as revised and effective September 1, 1948, the papers herein may be considered as a petition for writ of certiorari, but this does not help appellant. As is stated in paragraph 5 of Rule 38 of this Court, review on certiorari is not a matter of right, but of sound judicial discretion. The decision of the Supreme Court of Missouri in the case at bar is in complete accord with and follows the controlling decisions of this Court, as has been pointed out hereinabove. There is no conflict between this decision of the Missouri Supreme Court and the controlling decisions of this Court nor is there conflict between the decision of the Missouri Supreme Court in the case at bar and the decisions of other State Supreme Courts or of the lower Federal Courts. Under these circumstances, it is submitted that the case at bar does not present a proper occasion for this Court to exercise its discretion and grant the writ of certiorari.

D.

Appellant is in Default in the Matter of His Brief Herein.

Rule 27, paragraph 7, Rules of this Court, provides that "When under this rule an appellant or petitioner is in default, the Court may dismiss the cause." Notice has been received that this case will be argued on March 31, 1949; however, appellant's brief was not received until

March 22, 1949, so that appellee had only eight days in which to answer the arguments of appellant, secure the printing of his brief and forward it to Washington to arrive before the case was argued. It is therefore, submitted that this case presents a proper situation for the application of the above mentioned Rule.

Thus, it is seen that the appeal herein was not timely and this Court is without jurisdiction to consider the case on the merits; the decision of the Supreme Court of Missouri in the case at bar is in accord with the controlling decisions of this Court, and therefore this appeal presents no substantial Federal question, and the case is not one wherein this Court should exercise its discretion to grant certiorari. Also appellant is in serious default as to the time of serving its brief herein. It is therefore, respectfully submitted that this appeal should be dismissed and, treating the appeal as a petition for writ of certiorari, the petition should be denied.

II.

The Missouri Supreme Court Decided, and Properly Decided, That the Colorado Judgment Was and Is Barred Because It Was Not Revived Within Ten Years from the Date of Its Original Rendition.

Section 1038, Missouri Revised Statutes, 1939, provides:

Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case

a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

This statute expressly bars the present suit. The judgment against Lamb, upon which this suit is based, was rendered by the Colorado court December 8, 1927, and the period of ten years set out in the above statute had long since passed before the judgment in question was revived or this suit instituted.

The petition pleads a judgment of revival entered October 27, 1945, more than seventeen years after the date of the rendition of the original judgment, but such revival was wholly ineffective to bring the judgment within the first exception of the statute.

To be effective, such revival of the Colorado judgment would have had to have been accomplished within ten years from the date of the original judgment, and then upon personal service.

The statute clearly provides that every judgment shall be presumed to be paid on the expiration of ten years and that no action may thereafter be maintained thereon. This refers to Missouri judgments and foreign judgments. The first exception provided relates to judgments which have been revived on personal service during the first ten year period after rendition.

In the case of *Hedges et al. v. McKittrick*, 153 S. W. 2d 790 (Mo. App.), the court said, l. c. 794:

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The consequences in this case cannot properly be said to be unjust or absurd. The Legislature anticipated the possibility of situations arising in which, as in this case, it might be unjust to limit the time in which a judgment could be enforced strictly within the ten-year period. To avoid such possibilities, the law-makers, therefore, in enacting Section 886, distinctly and specifically provided for an exception whereby the result, which intervenors contend is absurd and unjust, could have been avoided. Intervenor failed to take advantage of the exception which the statute itself provides *by failing to revive the judgments within ten years after their rendition*. While it is true intervenors were not in a position at any time after the rendition of the judgments, to have execution levied to collect the same because there never was a sale, there was nevertheless nothing to prevent them from keeping the judgments alive by reviving them within the period required by Section 886, *supra*. Under said section intervenors had a complete remedy by revival of their judgments within the ten-year period, and having permitted that period to pass without revival, *they are in no position to complain of an absurd result, nor can they properly charge that they have been deprived of their property not only without due process but without any process, as they state it, because they failed to avail themselves of the process which was open to them* (Italics ours).

and in the case of *Mayer v. Mayer*, 342 Mo. 401, 116 S. W. 2d 1, the court said, 116 S. W. 2d 1, c. 3:

"It has several times been held in this state that a judgment for alimony, whether in gross or payable in periodical installments, is subject to the same incidents as other judgments in actions at law and becomes dormant ten years after rendition unless kept alive by payments within such period or by revival" (Italics ours).

and also: l. c. 5:

Under said Section 886 the payment, in order to extend the time, or toll the statute, must be made within the ten year period and must be entered upon the record (Italics ours).

And in *Dreyer v. Dickman*, 131 Mo. App. 600, the court said, l. c. 665:

"An ample remedy is provided in favor of the wife, by a revival of her judgment by scire facias before ten years have elapsed and from one ten year period to another. That there may be successive revivals to keep a judgment alive so that an execution will issue on it after it has run more than ten years, was decided by the Supreme Court in *Goddard v. DeLaney*, 181 Mo. 564, 80 S. W. 886. It is true a judgment like this one is of a continuing character; but we see no reason why it is not essential to revive it in order that it may be enforced by execution after ten years, just as in the case of other judgments" (Italics ours).

This statute contains exceptions and the Missouri courts have held that there are no other exceptions. In *Hedges v. McKittrick*, *supra*, the court said:

"It will thus be seen that our Supreme Court has construed Section 886 [now Sec. 1038] *supra*, to mean exactly what it says and that the only exception to the rule that a judgment shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof are the two exceptions, namely, revival of the judgment or a payment of record made in accordance with the provisions of the statute itself."

Any doubt that may have existed as to the effect of Section 1038 was resolved in a recent decision of the Missouri Supreme Court in the case of *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S. W. 2d 422. The

plaintiff in 1946 filed his suit in Missouri upon a Wisconsin judgment rendered on October 31, 1932. The defendant pleaded Section 1038 of the Missouri Statutes, and on motion for judgment on the pleadings the defendant alleged that the Statute of Limitations in Wisconsin ran for twenty years, and that therefore under Article IV, Section 1, of the Constitution of the United States the Wisconsin judgment was entitled to full faith and credit, and the Missouri ten-year statute could not be applied. Defendant also filed a motion for judgment on the pleadings based on the ten-year statute. Plaintiff's petition was dismissed. In commenting upon the effect of the Missouri ten-year statute, the Court said, 203 S. W. 2d 1. c. 425:

"However in 1895 the former statute creating a presumption of payment was repealed and a new one enacted in somewhat the present form. Laws, 1895, p. 221. Except in cases of revivor or partial payment entered upon the record a judgment was conclusively presumed to be paid. A further provision was added, namely: 'no execution, order or process shall issue thereon; nor shall any suit be brought, had or maintained thereon for any purpose whatever.' It thus appears the statute joined a conclusive presumption of payment with a limitation on the right to maintain any action and became in effect a statute of limitation. Under such circumstances even an admission the judgment was not paid, if there was one, would not destroy the conclusive presumption and, furthermore, would not remove the bar of the limitation. In *Hedges v. McKittrick*, (Mo. App.) 153 S. W. 2d 790, it was held that nothing is allowed to interrupt the running of Section 1038 against a judgment save some exception found in the section itself.

"Although plaintiff in this case alleged payments were made on the judgment, the term of 10 years expired thereafter and before the institution of the present suit. Therefore, since plaintiff is unable to

bring his judgment under an exception of the statute, the conclusive presumption of payment must follow because the period has run. Furthermore, this action is also barred by the limitation feature of the statute."

On the basis of the foregoing authorities the Missouri Supreme Court in the case at bar held that this suit on the Colorado judgment was barred by the above statute. Had the Court reached any other conclusion it would have amounted to an amendment of the statute to give preferential treatment to foreign judgments. The contention of appellant, if sustained, would, in effect, amend the Missouri statute of limitations to provide that in suits on foreign judgments the statute of limitations of the state which rendered the judgment will be applied by the Missouri courts in suits in Missouri on such judgments. Thus, suit on a foreign judgment, no matter how stale, would not be barred if brought within the period prescribed by the state wherein the judgment was rendered and revived, but judgments rendered by Missouri courts would still be barred by the ten year statute. This was not the intent of the Missouri legislature when it enacted Section 1038, *supra*, and is exactly contrary to the legislative policy as expressed in that statute which treats domestic and foreign judgments precisely alike.

The full faith and credit clause of the Constitution of the United States does not require that this statute be so amended by judicial interpretation and gives no support for the contention of appellant, as is pointed out under point III, *infra*. Therefore, it follows that the Missouri Supreme Court properly held that the present cause of action was barred by the Missouri Statute of Limitations.

III

The Decision of the Missouri Supreme Court in the Case at Bar Does Not Contravene Article IV, Section 1, of the Constitution of the United States, Is in Accord with the Controlling Decisions of This Court and Should Be Affirmed.

The case at bar was commenced in the Circuit Court of Jackson County, Missouri, at Kansas City, on December 13, 1945. This is a suit on the judgment rendered against appellee in Colorado on December 8, 1927, and revived in Colorado on October 27, 1945. Appellee was not served in Colorado in the revival proceedings, but the revival was on constructive service on appellee in Kansas City, Missouri.

Section 1033, Missouri Revised Statutes, 1939, *supra*, provides that a judgment, either foreign or domestic, shall be conclusively presumed to be paid and no action shall be maintained thereon more than ten years after its original rendition, unless such judgment was revived within ten years on personal service. Thus the present action comes clearly within the purview of this statute and is barred thereby.

The Missouri Statute, Section 1033, *supra*, is a statute of limitations; it has been so held and applied in *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S. W. 2d 422; and *Crane v. Reinking*, Mo. App. 215 S. W. 2d 759. In its opinion in the case at bar, Mo. , 213 S. W. 2d 416, the Missouri Supreme Court applied this statute as a statute of limitations and held that plaintiff's cause of action on the Colorado judgment rendered in 1927 and revived in Colorado in 1945 was barred. This holding did not contravene the full faith and credit provisions of Article IV, Section 1, of the Constitution of the United States.

The full faith and credit clause requires that judgments of one state must be given full faith and credit in a sister state, and must be enforced in the sister state to the same extent as would be done in the state which rendered the judgment. However, this applies to the substantive issues that were adjudicated in reaching the judgment, and the courts of the sister state cannot go behind the judgment and re-examine the original cause of action. The full faith and credit clause does not apply to procedural matters such as the Statute of Limitations. Thus, in *McElmoyle v. Cohen*, 38 U. S. 312, 10 L. Ed. 177; and *Bacon v. Howard*, 61 U. S. 22, 16 L. Ed. 811, the Supreme Court of the United States held that where suit is brought on a foreign judgment, the Statute of Limitations of the State of the forum is applied, and not that of the State wherein the judgment was rendered. The Statute of Limitations is held to affect the remedy only and not the merits of the judgment, and thus the full faith and credit clause does not prevent the application of the local Statute of Limitations. Mr. Justice Wayne, when discussing this matter in *McElmoyle v. Cohen*, *supra*, said:

“ * * * But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the Statute of Limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common law principle, then, applies to suits upon them that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.”

In *Bacon v. Howard*, *supra*, the Court said:

*** * * the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each State to legislate upon the remedy in suits on judgments of other States, exclusive of all interference with their merits. The case of *McElmoyle v. Cohen*, 13 Pet. 312, leaves nothing further to be said on this subject."

These cases of *McElmoyle v. Cohen*, and *Bacon v. Howard*, *supra*, have been repeatedly cited with approval and followed as controlling by this Court, by the lower Federal Courts and by the various state courts. Citations on this proposition are legion; see, for example, *Townsend v. Jemison*, 9 How. 407, 13 L. Ed. 194; *Alabama State Bank v. Dalton*, 9 How. 522, 13 L. Ed. 242; *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Campbell v. Holt*, 115 U. S. 620, 29 L. Ed. 483; *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. Ed. 1080; *Campbell v. Haverhill*, 155 U. S. 610, 39 L. Ed. 280.

On the basis of the *McElmoyle* and *Bacon* cases and the cases following them, together with such earlier cases as *Hawkins v. Barney*, 5 Pet. 457, 8 L. Ed. 190; and *Bank of United States v. Donnally*, 8 Pet. 361, 8 L. Ed. 974, has been founded the generally accepted and undisputed rule that the state of the forum may apply its own statute of limitations to suits on foreign judgments and that such action does not violate the full faith and credit provisions of Article IV, Section 1, of the United States Constitution. See 34 C. J. 1110, Judgments, Secs. 1577 and 1578, 52 A. L. R. 567. In 31 Am. Jur. 346, Judgments, Sec. 848, this general rule is stated thus:

As to the operation of the full faith and credit provision, it has uniformly been held that each of the States of the Union may pass a law limiting the time within which an action may be brought on a judgment rendered in another State, without thereby depriving the judgment of the full faith and credit to which it is entitled under the Constitution of the United States

The Supreme Court of Missouri recognizes and follows this general rule in the application of its statute of limitations to suits on foreign judgments. See *Northwestern Brewers Supply Co. v. Vorhees*, 356 Mo. 699, 203 S. W. 2d 422, where the Court said, 1. c. 203 S. W. 2d at 423:

Plaintiff's position is that full faith and credit means full faith and credit for the full term of the duration of the judgment under the law of the place where the judgment was obtained, and that the statute of Missouri, where suit was brought on the judgment, prescribing a shorter term violated the full faith and credit clause of the Federal Constitution, and was therefore unconstitutional. We are unable to agree with plaintiff's position and find that a similar contention has been overruled in a number of cases. Anno. 52 A. L. R. 566. See also 11 Am. Jur. Conflict of Laws, Sec. 192; 34 C. J., Judgments, Sec. 1577.

The plea based on a statute limiting an action on a foreign judgment is one to the remedy, and it is the general rule that the law of the forum will govern rather than that of the place where the judgment was rendered.

The Court then discussed the case of *McElmoyle v. Cohen*, 38 U. S. 312, 10 L. Ed. 177, and other decisions of the Supreme Court of the United States and held on this point 1. c. 424:

"We hold the application of the Missouri 10-year statute of limitations is not contrary to the full faith and credit clause."

This right to limit suits on foreign judgments by the law of the forum is of course restricted by the requirement that such limitation must be reasonable. See *Keyser v. Lowell*, (C. C. A. 8) 117 Fed. 400; and *Lamb v. Powder River Live Stock Co.*, (C. C. A. 8) 132 Fed. 434. The period of limitations found in the Missouri statute, Section 1038, *supra*, is ten years. This clearly satisfies all requirements of reasonableness, especially when it is remembered that this statute applies with equal force to both domestic and foreign judgments. Judgment creditors who have secured their judgments in Missouri and those who have secured their judgments in any court of record of the United States or of any other state, territory or country, are treated exactly alike.

Missouri, by this statute, has enacted as its policy that suits on all judgments, whether foreign or domestic, are barred ten years after the original rendition thereof, with certain exceptions. This policy is clearly reasonable since it applies with equal force to both domestic and foreign judgments and gives much more than adequate time to any judgment creditor to enforce his judgment and also provides means by which such judgments may be kept alive beyond this ten year period.

Defendant contends that the time limit provided in this statute of limitations should begin to run from the date of the Colorado revival. This entirely ignores the provision of the statute that action on a judgment, either domestic or foreign, must be brought within ten years of its original rendition. In considering this question the Missouri Supreme Court, in its opinion in the case at bar, said, 213 S. W. 2d 1. c. 419:

*** Definitely, it is the law of this state that a foreign judgment, absent revival, or a payment thereon as provided in Sec. 1038, is barred in 10 years from

the date of its original rendition regardless of what the limitation period may be under the law of the state where the judgment was rendered. *Northwestern Brewers Supply Co. v. Vorhees, supra*. And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum."

Thus it is seen that the Supreme Court of Missouri has held that the statute of limitations starts to run on the date of the original rendition of the judgment and does not start to run anew unless the judgment is revived within ten years of such original rendition. Such holding as to when the statute of limitations starts to run involves a purely local matter and does not violate the full faith and credit clause of the Federal Constitution: See *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, where Mr. Justice Gray, speaking for the Court said, 1 c. 162 U. S. 339, 40 L. Ed. 991:

"The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court."

It is clear that the revival of the Colorado judgment in Colorado by constructive service on appellee in Missouri did not amount to a new judgment, action on which was not barred by the Missouri statute of limitations, and did not serve to start said statute of limitations running anew on the original judgment rendered in 1927. This question is squarely and conclusively resolved in favor of appellee by the case of *Owens v. McCloskey, Executor of Henry*, 161 U.S. 642, 40 L. Ed. 337. In this case the original judgment was rendered in Pennsylvania. The defendant Henry soon moved to Louisiana and lived there until he died. The judgment was revived in Pennsylvania on two returns of *nihil* on *scire facias*. No personal service in the revival proceedings was had on defendant and he did not appear. Suit on this judgment was then brought in Louisiana, where defendant resided. This Court pointed out that this revival merely served to keep alive the lien of the judgment in Pennsylvania and, viewed either as a new judgment or as a continuation of the old one, it would not support the present action. Speaking for the Court, Chief Justice Fuller said:

"Viewed as a new judgment rendered as in an action of debt, it had no binding force in Louisiana, as Henry had not been served with process or voluntarily appeared. And considered as in continuation of the prior action and a revival of the original judgment for purposes of execution, on two returns of *nihil*, it operated merely to keep in force the local lien, and could not be availed of as removing the statutory bar of the *lex fori*, for the same reason."

In this connection see also *Davis v. Davis*, (C. C. A. 4) 174 Fed. 786.

In its brief appellant has for the first time raised two points which were not presented to or decided by the court

below. The first is that the form of the judgment is not proper, even if the statute of limitations is properly applied, because under it all rights of appellant are concluded in Missouri and elsewhere by the operation of the doctrine of *res judicata*. The second is that the constructive service had on appellee in the revival proceedings meets all of the requirements of due process. Since these points are raised here for the first time they are not properly in the case and should not be considered by this Court. *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 57 L. Ed. 393; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 80 L. Ed. 54.

The argument of appellant is based on the assumption that the revival proceedings in Colorado resulted in an entirely new judgment on October 27, 1945; that the ten year period of the Missouri statute of limitations started to run anew on that date, and that nothing behind that date can be considered. This, of course, is contrary to the facts. The proceedings in Colorado were exactly what their name implies, revival proceedings. They did not result in an entirely new and independent judgment, they revived the original judgment of December 8, 1927, which has been given another twenty years of life. By this revival the result is the same as if the Colorado statute of limitations on judgments had fixed a period of thirty-seven years, eleven months and eleven days. In either case the judgment would be barred in Colorado on October 28, 1965. In either case it is the judgment of December 8, 1927, which is the basis of the appellant's cause of action in the case at bar, its life in Colorado has merely been extended by the Colorado revival.

If appellant's contention were to prevail it would lead to this anomalous situation: suit on this judgment in Missouri, appellee's domicile, was barred by the Missouri

statute of limitations on December 9, 1937, and appellee could not be thereafter sued in Missouri on said judgment. Then on October 27, 1945, seven years, ten months and eighteen days later, by action in Colorado without personal service on appellee, he again becomes liable to suit on the Colorado judgment of December 8, 1927. As has been pointed out above, this would amount to an amendment of the Missouri Statute of Limitations to provide that the statute of limitations of the state which rendered the judgment, not Missouri, would be applied to suits in Missouri courts on foreign judgments.

That the Colorado revival proceedings did not result in a new and independent judgment but merely gave the original judgment extended life clearly appears, even from the authorities cited by appellant. Thus in 2 Freeman on Judgments, p. 2290, Sec. 1102, 5th Ed., it is said:

"But a mere judgment of revivor does not otherwise add anything to the efficacy of the original judgment, since it is not a readjudication of the subject matter but is simply a continuation of that judgment in force and effect" (Emphasis added).

Kuykendall v. Tod, (C. C. A. 8) 219 Fed. 707, is cited by appellant as supporting its position. In this case the court interpreted the Colorado statute of limitations and held that by its provisions it began to run anew when the Wyoming judgment was revived. The question of full faith and credit was not involved. What provisions may be contained in the Colorado statute has nothing to do with the provisions of the Missouri statute of limitations and their proper application. The court here decided the effect of the provisions of the Colorado statute, just as the Missouri Supreme Court decided the effect of the Missouri statute, and since full faith and credit was not in-

involved or considered, the *Kuykendall* case is not authority for the contention of appellant.

The weakness of appellant's position that the Colorado revived judgment is entirely new and stands alone without support from the original judgment of 1927 is demonstrated clearly by the switch which appellant is forced to make in order to try to support the service that was had in the Colorado revival proceedings. In part C of its brief, dealing with service, appellant completely abandons its contention that the revival resulted in a new and independent judgment and points out that there was personal service in the proceedings which resulted in the original judgment in 1927; that the revival was merely a continuation of the original action and not a new action. On this basis the appellant then asserts that the original service in 1927 meets all the requirements of due process and continues so as to satisfy the due process requirements in the revival proceedings.

Thus, it is apparent that appellant wants to have his cake and eat it too; he wants to defeat the Missouri statute of limitations with the theory that a new and independent judgment resulted from the Colorado revival proceedings, and sustain the service in such revival proceedings on the diametrically opposite theory that the revival proceedings are only a continuation of the original action, not a new action. In this connection, it is well to note that appellant states that the Missouri Supreme Court assumed that there was a valid second defense on the matter of service, whereas, in fact, the opinion of the Missouri Supreme Court twice states that the Court expressly refrained from deciding that question and for the purposes of the opinion assumed the service to be valid. The Court said, l.c. 418:

... * * We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Sec. 1038."

and again, 1st c. 419:

"Our ruling, *supra*, disposes of this appeal, hence it is not necessary to rule the second defense that the service upon defendant for revival of the Colorado judgment was not *personal service* within the meaning of that term in Sec. 1038."

From the foregoing it appears that the Missouri Supreme Court followed the universally recognized rule and the controlling decisions of this Court and applied the Missouri statute of limitations to this suit on a Colorado judgment. In doing so there was no violation of the full faith and credit clause of the Constitution of the United States (Article IV, Section 1), and the decision of the Missouri Supreme Court should be affirmed.

CONCLUSION.

From the foregoing it appears that this Court is without jurisdiction of the appeal because the appeal was not timely and that the appeal should not be allowed because it presents no substantial Federal question. However, in the event this appeal is considered on its merits, it appears that appellant's cause of action was barred by the Missouri statute of limitations and that the Supreme Court of Missouri did not violate the full faith and credit clause of the Constitution of the United States by its application of the Missouri statute of limitations to the case at bar. It is, therefore, respectfully submitted that this appeal should be dismissed, or, if the merits of the case are considered, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

DANIEL L. BRENNER,
Counsel for Appellee.

CORNELIUS ROACH,
WILFRED WIMMELL,
FRED L. HOWARD and
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

UNION NATIONAL BANK OF WICHITA, KANSAS,
A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE MISSOURI SUPREME COURT.

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE,
FOR A MODIFICATION
OF THE OPINION.

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
FRED L. HOWARD,
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Of Counsel.

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Supreme Court of the United States

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APPEAL FROM THE MISSOURI SUPREME COURT.

**PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, FOR A MODIFICATION
OF THE OPINION.**

Comes now Carl C. Lamb, appellee herein, and prays the Court to grant a rehearing in this cause, or, in the alternative to modify its opinion, and as grounds for said petition states as follows:

I.

The Court has inadvertently misconstrued the decision of the Missouri Supreme Court.

II.

Even if it were assumed, *arguendo*, that there was a new and independent Colorado judgment in 1945, the decision of the Missouri Supreme Court would still be correct.

III.

In the event that a rehearing be denied, the opinion of this Court should be modified to clearly remand the case for further proceedings.

Wherefore, appellee prays the Court for a rehearing in said cause, or, in the alternative, for a modification of its opinion.

Respectfully submitted,

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
FRED L. HOWARD,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

STATEMENT OF THE CASE.

On December 8, 1927, appellant recovered a judgment against appellee at Denver, Colorado (R. 3). This judgment was revived in Colorado on October 27, 1945 (R. 4). Service in the revival proceedings was by notice mailed to appellee in Kansas City, Missouri, and by delivery to appellee in Kansas City, Missouri, where appellee resided (R. 10, 12).

The present action was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City (R. 1).

ARGUMENT.

I.

The Court has inadvertently misconstrued the decision of the Missouri Supreme Court.

As the basis for its opinion this Court assumes that the order of revival entered by the Colorado Court on October 27, 1945 (R. 4), had the force and effect of a new and independent judgment, and that the Missouri court in the present action could not look behind that order of revival. This assumption was erroneous. This revival did not have the force and effect of a new and independent judgment, and appellant, who had the burden of proving such issue, neither alleged nor offered any proof to support such a contention.

The petition upon which the present cause of action is based (R. 1-3) does not declare upon a judgment entered in 1945; on the contrary the cause of action as pleaded in this petition is on the judgment rendered by the Colorado Court on December 8, 1927, for \$3,493.01, together with the

costs awarded at the time of such judgment and interest from the date of such judgment, i. e., from December 8, 1927.

Attached to this petition were copies of the proceedings of the Colorado Court (R. 3-4). Authenticated copies of these proceedings were offered in evidence (R. 9). These proceedings of the Colorado Court show clearly that there was no new judgment rendered in 1945; they show that the only action of the court was to order that the 1927 judgment "be, and the same is hereby revived." This record demonstrates that there was no judgment of any kind or for any amount entered at that time (1945), but that the only action taken was to extend the life of the 1927 judgment.

If the fact had been that the Colorado revival was a new and independent judgment, it would have been incumbent on appellant to show that fact. This it did not do, and this Court erred in assuming that revival had the effect of creating a new and independent judgment in the absence of such a showing. In fact it is apparent from the Colorado statutes cited and quoted by appellant (3 Colo. Ann. St., Ch. 93, Sec. 2, and Ch. 6, Sec. 54(H)) that only revival is authorized and that a new and independent judgment is not authorized.

The opinion of this Court misconstrues the decision of the Missouri Supreme Court, which court had these facts before it when it reached its decision. The cause of action pleaded by appellant did not purport to be on a judgment entered in 1945, it was specifically based on a judgment for \$3,493.01 entered in 1927, together with costs and interest from 1927. The Colorado order of revival did not purport to enter a new judgment in 1945, it only revived, extended the life of, the 1927 judgment. The Colorado statutes under which the 1945 revival was had did not purport to authorize a new and independent judgment, they only authorized a

revival extending the life of the original judgment. Appellant did not present any showing whatsoever that the 1945 revival was anything other than what it purported to be, a mere extension of the life of the original 1927 judgment. Under these circumstances it is implicit in the decision of the Missouri Supreme Court that the revival of 1945 did not result in a new and independent Colorado judgment to which Missouri must give full faith and credit, and which must start the Missouri statute of limitations running anew. This implicit holding is the basis upon which the Missouri opinion rests even if the Missouri Supreme Court did not expressly spell out such decision in its written opinion.

With such a basis the Missouri Supreme Court then quite properly looked to the Missouri statute of limitations and the cases interpreting such statute, and applied it to the facts of the case at bar. Since there was no showing of any 1945 judgment that required full faith and credit, the record proved the contrary, the Missouri Supreme Court then looked to its statute and held that the case did not come within any of the exceptions set up by that statute, and that the cause of action on the 1927 judgment was barred by limitations. This decision was, as the Missouri Supreme Court pointed out, in perfect accord with the controlling decisions of this Court in such cases as *McElmoyle v. Cohen*, 38 U. S. 312, 10 L. Ed. 177, and *Bacon v. Howard*, 61 U. S. 22, 15 L. Ed. 811.

Once the Missouri Supreme Court had decided, as a basis for its opinion that there was no new and independent Colorado judgment rendered in 1945 behind which it could not look, it then turned to the statute of limitations and held that the statute began to run at the original rendition of the Colorado judgment in 1927, and that the present action was barred thereby. This decision as to when limitations began to run is purely a mat-

ter of state law and does not present any Federal question for review by this Court as was held in *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986.

Therefore, this Court misconstrued the decision of the Missouri Supreme Court and was in error in assuming that there was a new and independent Colorado judgment in 1945 upon which this suit was based. This Court was also in error when it stated that *Roche v. McDonald*, 275 U. S. 499, 72 L. Ed. 365, was controlling in this case. In *Roche v. McDonald* this Court enforced the long established rule that the court of the forum cannot look behind the foreign judgment to the cause of action on which it was based and decide whether or not to enforce that original cause of action. The case did not involve any question of the effect of revival, and did not involve the application of the statute of limitation of the forum to suit on a foreign judgment.

II.

Even if it were assumed, arguendo, that there was a new and independent Colorado judgment in 1945, the decision of the Missouri Supreme Court would still be correct.

Appellee does not admit that there was a new and independent Colorado judgment rendered in 1945, but strenuously denies that such is the fact. However, if for the purposes of argument such a judgment is assumed, the result reached by the Missouri Supreme Court is still correct, as has been decided by this Court.

Appellant, in attempting to evade the bar of the Missouri statute of limitations, finds itself on the horns of a dilemma. If it bases its cause of action on the original 1927 Colorado judgment (as in fact it did do), the statute

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of limitations has long since run and the action is barred; if it bases its cause of action on a new and independent judgment rendered in 1945, there was no personal service on the defendant to support jurisdiction of the Colorado court to render such a judgment *in personam* and such judgment, if one had been rendered, would violate due process, and therefore be void and not entitled to full faith and credit. It should be remembered that in the Colorado revival proceedings the only service on appellee was had in Kansas City, Missouri, where he resided (R. 12).

In attempting to meet this dilemma appellant has taken two diametrically opposite positions. When faced with the statute of limitations it contends that there was a new and independent judgment rendered in 1945 which demands full faith and credit and which started the Missouri statute of limitations running anew. However, this contention consists wholly and only of a flat statement of this conclusion reiterated in many different ways. Appellant has not shown any authority or facts to support this conclusion, and, as is pointed out hereinabove, everything in the record of this case including the applicable Colorado statutes proves that this conclusion is false. When faced with the lack of service to support the jurisdiction of the Colorado court to render such a new and independent judgment *in personam* in 1945 with the result that such judgment if rendered would be void for lack of due process, appellant contends that the revival proceedings were merely an extension of the original proceedings and did not result in a new and independent judgment *in personam* and therefore did not require personal service to sustain the jurisdiction of the Colorado court and to satisfy due process.

These opposite and inconsistent positions do not resolve the dilemma. In fact, it is not necessary to resolve it since this Court has long since concluded the question by its decision in *Owens v. McCloskey, Executor of Henry*, 161 U. S. 642, 40 L. Ed. 837, where it was held that regardless of which view was accepted the plaintiff could not recover; if the revival was considered to be a new judgment, it was void for lack of personal service on the defendant within the jurisdiction of the Court, and if the cause was based on the original judgment, it was barred by the statute of limitations of the forum.

It is, therefore, respectfully submitted that a rehearing should be granted in this case because it is implicit in the decision of the Missouri Supreme Court that there was no new and independent Colorado judgment in 1945, and such decision was the only one that could have been reached from the record in the case; because this Court inadvertently misconstrued the decision of the Missouri Supreme Court and erred in assuming that there was a new and independent Colorado judgment rendered in 1945; because this Court erred in holding *Roche v. McDonald* to be controlling when said case did not consider the issues involved in the case at bar; because in any event the decision of the Missouri Supreme Court reached the correct result since under the decision of this Court in *Owens v. Henry* appellant could not recover on a new and independent 1945 judgment because lack of service rendered it void, and it could not recover on a 1927 judgment because barred by the Missouri statute of limitations.

III.

In the event that a rehearing be denied, the opinion of this Court should be modified to clearly remand the case for further proceedings.

Counsel for appellee are uncertain as to the exact disposition made of this case. The opinion of this Court states on page 6 that the questions of the effect of the 1945 revivor and whether the service satisfies due process are not decided and that "both of those questions will be open on remand of the cause." However, the suggestion that the judgment be vacated, which is the procedure advocated in the dissenting opinion of Mr. Justice Frankfurter, is put aside and the opinion ends with the order "*Reversed.*" Again, in the Journal of Proceedings of this Court as reported in 17 Law Week. 3341, it says: "The judgment is reversed with costs and case remanded to said Supreme Court for further proceedings not inconsistent with the opinion of this Court."

In order to avoid pointless argument between the parties as to the exact status of the case, and to make clear the proper functions of the Missouri courts in further proceedings in this case, this Court is respectfully requested, in the event a rehearing is denied, to modify its opinion so as to clearly order that the case is remanded for further proceedings not inconsistent with its opinion.

Respectfully submitted,

DANIEL L. BRENNER,

CORNELIUS ROACH,

Counsel for Appellee.

WILFRED WIMMELL,

FRED L. HOWARD,

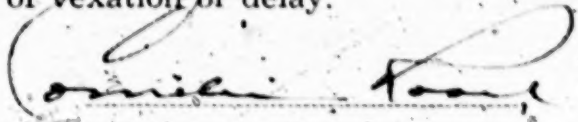
ROACH, BRENNER & WIMMELL,

All of Kansas City, Missouri,

Of Counsel.

CERTIFICATE.

I, Cornelius Roach, certify that I am one of the counsel for Carl C. Lamb, appellee herein, and that this petition for rehearing or for modification of the opinion is filed in good faith and is believed to be meritorious, and that it is not filed for the purpose of vexation or delay.

A handwritten signature in cursive script, appearing to read 'Cornelius Roach', written over a horizontal line.

CORNELIUS ROACH.

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**Supreme Court of the
United States**

500

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA, KANSAS,
A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM SUPREME COURT OF MISSOURI
DISMISSED AND CERTIORARI GRANTED.

**RESPONSE OF APPELLANT TO PETITION FOR
REHEARING OR TO MODIFY OPINION.**

MAURICE J. O'SULLIVAN,
Counsel for Appellant.

JOHN G. KILLIGER, JR.,
Of Counsel.

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Supreme Court of the United States

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THE UNION NATIONAL BANK OF WICHITA, KANSAS,
A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM SUPREME COURT OF MISSOURI
DISMISSED AND CERTIORARI GRANTED.

**RESPONSE OF APPELLANT TO PETITION FOR
REHEARING OR TO MODIFY OPINION.**

STATEMENT.

In lieu of valid reasons to justify a rehearing, Appellee substitutes arguments foreign to the issues and to the record here and in the State courts.

The propriety of modification of the majority and dissenting opinions to conform with the limited issues presented for decision by the record is conceded. Modification by the Court *ex mero motu* is suggested as a more practical method to remedy inadvertences, than Appellee's motion to modify. Modifications to limit the decision to the issues presented by the record should eliminate possible misinterpretations of important questions of procedural and substantive law and materially enhance the value of the decision as a precedent for Bench and Bar.

I.

The two questions left open on remand (Opinion, p. 6), were not pleaded and were not in issue in the state courts. They are foreign to the issues presented by the record. The decision inadvertently overlooked controlling authorities ruling that such questions are not properly subject to determination by the State courts on remand.

A.

The questions left open on remand were not pleaded and were not in issue in the State courts.

Appellant was lawfully entitled to judgment in the trial court, to accord the same full faith and credit to the judgment of revival as it had by law in Colorado, when the duly authenticated copy of the Colorado judgments was introduced in evidence (R. 11), because there were no valid defenses pleaded thereto. 3 Colo. St. Ann., 1935, Ch. 93, Sec. 2, p. 1036, provides that execution may issue on original judgments, "to enforce the same, at any time within twenty years from the entry thereof." 1 Colo. St. Ann., 1935, p. 210, Ch. 6, Rule 54 (h), provides:

"A revived judgment must be entered within twenty years after the entry of the judgment which it

revives, and may be enforced and made a lien in the same manner, and for a like period as an original judgment.

Execution may issue on the judgment of revivor to enforce the same, in the same manner and for a like period as an original judgment. It was entitled to the same full faith and credit in Missouri as it had by law in Colorado.

The Colorado statutes and decisions were judicially known to and were before the State courts by agreement of counsel (R. 12), and under *Missouri Civil Code, Section 847.54, Laws Missouri, 1945, page 353*, because of the allegations in the petition relating thereto. They are also judicially known to this Court (*A. L. I., Restatement of Conflict of Laws, Sections 624, 625, page 738*).

The pleadings (R. 1, 6), the objections and statements of Appellee's counsel (R. 9, 12), and the State court opinion (R. 19, 23), conclusively establish that the questions left open on remand were not pleaded in defense, nor were they presented to or in issue before the State courts. The foregoing record references disclose that the only purported defenses pleaded and relied upon in the State courts were based on Sec. 1038, R. S. Mo., 1939.

Appellee (R. 5, 12), contended that the original Colorado judgment was conclusively presumed to be paid and was barred by limitation under Section 1038 because the judgment of revivor was not rendered within ten years, and that the personal service of notice and of the motion to revive in Missouri, made by a deputy sheriff and by registered mail, was not "personal service," as required by Section 1038.

Appellee offered no evidence. The record does not indicate when he left Colorado nor when he came to Missouri. The statement of his counsel in the trial court (R.

12) that, "I do not know the effect of this revival in the State of Colorado," definitely shows that no issue was presented to cast a burden upon Appellant to establish that the judgment of revival was a new judgment. It is manifest that such judgments are new judgments under Colorado law. 3 Colo. Stat. Ann., 1935, Ch. 93, provides that the defendant may appear and answer in the same manner complaints are required to be answered and that the court shall try and determine any issues so formed the same as any other issues made by the pleadings and shall hear any evidence necessary to decide the matter. If the court decides to revive the judgment, *in whole or in part*, it shall so order and the papers and proceedings shall be attached to the original files in the cause. To review errors in such judgments, motion for a new trial must be filed within ten days, under Rule 59. Execution may issue on such revived judgments, the same as on an original judgment. Rule 54 (h), *supra*, provides that "Revived judgments may themselves be revived in the manner herein provided."

From the face of the Colorado statutes, without the aid of the decision of its Supreme Court, it is manifest that the proceedings to revive are a continuation of the original action, but that the judgment of revivor is a new judgment, which itself may be revived, and that execution issues to enforce the judgment of revivor in the same manner as an original judgment, but that execution does not issue on the original judgment after the rendition of a judgment of revivor. It was competent for the law of Colorado to so provide and to have the same full faith and credit given thereto elsewhere as given by law in the Colorado courts.

In contrast, the Missouri statute provides for successive revivals of the original judgment, but execution issues on the original judgment and not on the judgment of re-

vival. Only the original judgment may be revived, without right of revival of a revived judgment.

The judgment of the Colorado court of general jurisdiction imported verity and was not subject to collateral attack in Colorado nor in Missouri. Personal service of process in accordance with law and Rule 4 of the Rules of Civil Procedure was recited therein. Neither the validity of such service nor of the Colorado Rule of Procedure authorizing it, was challenged as a denial of due process. The Colorado Rule is presumed to be valid as it deals with a subject within the scope of legislative power. *Hardware D. Mut. Fire Ins. Co. v. Glidden Co.*, 284 U. S. 151, 158, 76 L. Ed. 214, 219, and cases cited therein. *Owens v. Henry*, 161 U. S. 642, cited in the opinion, page 6, has no application, because the Pennsylvania judgment denied full faith and credit because of a ten year limitation statute in Louisiana, was based on two writs of *scire facias* returned "nihil," and not on personal service on defendant, who resided in Louisiana for some fifteen years before suit was filed in Louisiana.

It was the mandatory duty of the Missouri courts to accord full faith and credit to the Colorado judgment of revivor and to render judgment thereon as prayed, when no valid defenses were presented thereto. The Missouri Supreme Court erred in failing to reverse, with directions to the trial court to set aside its judgment and to enter judgment according to the prayer of plaintiff's petition. Its judgment should be reversed with such directions.

The decision inadvertently overlooked controlling authorities ruling that the questions left open are not properly subject to determination by the State courts upon remand under its recognized procedure.

An extensive list of cases of this Court and of the Supreme Court of Missouri, are cited in 4 C. J. S., Sec. 233, pp. 438, 439, in support of the text reading:

"that if a defendant in the trial court, by failure to plead, to request instructions or introduce evidence, to object to instructions or evidence, or otherwise fails to present a defense which he might make, and submits issues ~~not~~ involving it, he will be bound in the appellate court by the case made by the pleadings and evidence as exhibited by the record, and cannot urge a defense which was not presented in the lower court."

4 C. J. S., Sec. 241 (a), p. 465, states:

"One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with or different from that taken by him at the trial, and that the parties are restricted to the theory on which the case was prosecuted or defended in the court below."

Numerous cases of this and of the Missouri courts are also cited in 3 Am. Jur. 59, Sec. 287, and at p. 63, Sec. 293, in support of the following:

287: "The general rule that an appellate court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or opposition not asserted and relied on in the trial court. Accordingly, where a defendant relies on

a certain defense in the trial court; he will not be permitted on appeal, to shift his position and present a defense that was not presented in the former court.

293: The general rule that an appellate court will not consider grounds of defense not asserted in the lower court is applicable ordinarily to defenses and objections based on constitutional grounds. Thus, the question of the constitutionality of a statute, ordinance, or administrative order, cannot ordinarily be raised for the first time on appeal. An exception to this rule has been made, however, in cases involving the deprivation of life or liberty."

This Court has repeatedly ruled that it will not consider objections on Federal grounds which are not presented by the record and passed upon by the State courts in the regular course of their proceedings. *Wilson v. Cook*, 327 U. S. 474, 90 L. Ed. 793, 801; *Missouri ex' rel. v. Gehner*, 281 U. S. 313, 74 L. Ed. 870; *N. W. Bell Tel. Co. v. Nebraska State R. Co.*, 297 U. S. 471, 80 L. Ed. 810. By analogy, Federal grounds not presented by the record should not be injected and left open on remand, contrary to the regular course of proceedings in the State courts.

We adopt the two cases cited on page 32 of Appellee's original brief to support his contention that the question of due process in the service in the revival proceedings was not properly in the case and should not be considered by the Court.

For accuracy and to avoid possible future errors, attention is called to misinterpretation in the majority and dissenting opinion of the ruling in *Northwestern Brewers Supply Co. v. Vorhees*. In closing, that opinion stated:

"Therefore, since plaintiff is unable to bring his judgment under the exception of the statute, the conclusive presumption of payment must follow because the period has run. Furthermore, this action is also barred by the limitation feature of the statute."

The latter sentence is proper. The prior sentence denied the integrity of the Wisconsin judgment and obliterated the debt evidenced thereby and the judgment which was still valid in Wisconsin. 34 Am. Jur. 16, Sec. 6.

Paragraph 3 of the dissenting opinion states the rule which generally applies to causes of action, but not to judgments. The rule is stated in 50 C. J. S. 444, Sec. 868 (a), as follows:

"By the weight of authority a judgment which has been allowed to become dormant under the laws of the state where it was rendered cannot be enforced by action in another state, even though the dormant judgment is subject to revival by a suit for that purpose, since to allow such enforcement would be to give effect to that which had no effect in the state where the judgment was rendered."

Cf. *Fowler v. Pilson*, 123 F. 2d 918, 74 App. D. C. 340, Note 8. Certiorari denied 316 U. S. 664.

CONCLUSION.

It is respectfully submitted that the majority opinion should be modified, beginning with the second paragraph on page 5, to state that the purported defenses based on Section 1038, did not constitute a defense. The validity of the service of process for the judgment of revival and Rule 4 of the Colorado Rule of Civil Procedure which authorized it, were not challenged as denying due process. The two questions left open on remand should be eliminated because they were not pleaded nor properly in issue on the record and are not properly subject to determination by the State court under its recognized procedure.

MAURICE J. O'SULLIVAN,
Counsel for Appellant.

JOHN G. KILLIGER, JR.,
Of Counsel.